Supreme Court, U.S.
FILED
JAN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1478

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IN THE
SUPREME COURT OF THE UNITED STATES

**********

October Term, 1988

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CORPUS CHRISTI TAXPAYERS ASSOCIATION,
TOM HUNT and JOE O'BRIEN,
Petitioners

-against-

CITY OF CORPUS CHRISTI, TEXAS
and STATE OF TEXAS,
Respondents

**********

# PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

for the Fifth Circuit

**********

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## QUESTIONS PRESENTED

1- The lower Federal courts have extended to absurdity the Feldman rule of "inexorably intertwined", combining as one, two separate causes of actions, each based on denial of two different Constitutional rights.

2- Is a Federal district court (having subjectmatter jurisdiction based on denial of civil rights) deprived of jurisdiction by reason of a prior state court judgment, which is a nullity?

3- A conflict of law between circuits should be resolved: Fifth Circuit has imposed sanctions, whereas in an earlier case, Pennzoil v Texaco, infra, sanctions mere not imposed on a like litigant by the Second Circuit.

## LIST OF PARTIES

The names contained in the caption of this case includes the names of all parties to this cause.

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1988

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CORPUS CHRISTI TAXPAYERS ASSOCIATION,
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vs

CITY OF CORPUS CHRISTI, TEXAS
and STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
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## OPINIONS OF LOWER COURTS

A copy of the opinion of the U.S. Court of Appeals for the Fifth Circuit is included in the Appendix, Pages 1-10. A copy of the Federal district court opinion is attached, App. Pages 11-15. Copies of the three opinions rendered in the court system of the state of Texas are also reproduced in the Appendix (trial court, App.pg.16, court of appeals, App.pp.17-23, and state supreme court App.pg. 24).

JURISDICTIONAL GROUNDS OF SUPREME COURT

The judgment of the U.S. Court of Appeals was entered in this case on August 22, 1988. A motion for rehearing, timely filed , was denied on October 14, 1988. The U.S. Supreme Court has jurisdiction under 28 USC Sec. 1254(1) [by writ of certiorari to U.S.Court of Appeals]. As to their Constitutional right to a hearing, Petitioners rely on Londoner v Denver (1908) 210 US 373. As to the nullity of state court judgments denying due process, Petitioners rely on Peralta v Heights Medical Center, Inc. (No. 86-1430, Decided 04/24/88) 56 Law Week pp. 4189-4191.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners assert denial of due process, XIV Amendment to the U.S. Constitution, in Appendix at Part 4. Petitioners rely also on Article 8, Section 21 of the Texas Constitution, (copy at Appendix Part 5), which provisions track the civil right set forth in Londoner v Denver, supra, namely, the requirement that

local governments must hold a hearing before an increase in ad valorem property tax can be adopted.

The statute, 28 USC Sec 1343, establishes jurisdiction of Federal district courts in cases where state governments, including subdivisions, have denied civil rights under 42 USC Sec. 1983.

The statute, 28 USC Sec. 1254(1), provides for Supreme Court jurisdiction over decisions of the U.S. Courts of Appeal.

## STATEMENT OF THE CASE

The one basic fact here is undisputed: Petitioners were denied a hearing by the Corpus Christi city council. The court proceedings were quite limited for Petitioners' two separate causes of action: (1) denial of civil rights by the City and (2) denial of due process by state courts where Petitioners sued to enforce their civil rights. Both causes were dismissed at the outset by both the Texas and Federal courts. The

state trial court dismissed by a summary judgment. The Federal court dismissed Petitioners' separate suit, based on lack of subject-matter jurisdiction. The Federal district court's dismissal is here appealed.

Material Events in Progress of This Case

Petitioners asked at a meeting of the Corpus Christi City Council that a public hearing be held prior to setting of the City's 1984 ad valorem tax. The Petitioners had a right to a hearing under Federal law, Londoner v Denver, supra. The rule of Londoner was incorporated into state law by a Texas Constitution provision, Article 8, Section 21. The city council denied Petitioners' request for a public hearing, and no hearing was ever held by the City before it set the 1984 property tax rate. By refusing to hold a hearing, the City denied Petitioners their civil rights in violation of 42 USC Section 1983.

Petitioners then filed a suit in a state court seeking a court order to compel the

City to hold a public hearing. The trial court ordered the suit dismissed, granting the City's motion for summary judgment, App. Part 3. The summary dismissal of the suit was contrary to law, as there existed a material, disputed issue of fact. That fact, whether there was an increase in tax, was highly controverted before the trial court.

Petitioners alleged there was an 16.8% increase in the property tax from the year 1983 to the year 1984. App. Part 6. (Memorandum of Plaintiffs in the trial court proceeding at page 11). The City in its arguments took a contrary position, contending there was no increase in tax. This fact is a material issue because a hearing is required only if there is an increase in tax. Art. 8, Sec. 21 of Tx. Constitution. The constitutional provision is supplemented by a "TRUTH-IN-TAXATION" statute, which orders a public hearing only if the tax increase exceeds 3%. The 3% threshold was far exceed-

ed by the 16.8% tax increase alleged by Petitioners. App.Part 6. The Texas district court record shows clearly that a dispute as to a material fact existed. Under these circumstances the trial court erred in granting a motion for summary judgment dismissing the suit. Rule 166-A, Texas Rules of Civil Procedure. The arbitrary dismissal is wrong on its face. This dismissal constituted a denial of Petitioners' right to due process of law.

Petitioners in the state court proceedings asserted their Constitutional rights. App. Part 8 (Third Amended Petition). The Texas court of appeals in its decision, App. Part 3, denied all petitions of Petitioners asserting their rights to due process. The Texas supreme court held that no reversible error was made by the Texas court of appeals.

Application of Law

Petitioners proceeded first in the state court to enforce their civil rights before resorting to the Federal courts, as required

by court decisions, Dawson v Childs (C.A.,Tx, 1982) 665 F2d 777. The only forum available to Petitioners was the state court system even though Petitioners sought to enforce a Federally guaranteed civil right. Arbitrary procedures of the state court, dismissing wrongfully Petitioners suit, operated to deny them their Federally guaranteed civil rights.

The state courts declined to rule clearly on Petitioners' allegations of denial of due process and other Constitutional rights. Although Petitioners asserted denial of due process, the state courts declined to rule clearly thereon. Consequently, Petitioners, having asserted their right to due process in the state courts should not have their case dismissed by a Federal court based on default (failing to assert their Constitutional rights) in the state courts), App. Part 8 (Third Amended Petition). Likewise, as no state court adjudicated the denial of due process, there is no preclusion in the Federal courts. App. Part 3.

In conclusion, Petitioners, denied their civil rights by the City as no hearing was held by the City, now seek to enforce their rights through an order of the Supreme Court to compel the City to hold a hearing. Secondly, Petitioners, denied due process in the state courts by the arbitrary dismissal, seek to have the dismissal declared void and a nullity. Then the Petitioners can proceed to enforce their civil rights, guaranteed under Federal law. This state court dismissal deprived Petitioners of due process of law, a right guaranteed by Amendment XIV. See Peralta decision, supra.

Petitioners have been deprived of their civil rights by the City, and of due process by the state courts, in violation of their Constitutional rights. The Federal courts have jurisdiction of the subject matter of this suit, the right to a public hearing which was never held. The Supreme Court has jurisdiction over this cause, as above noted.

## BASIS FOR FEDERAL JURISDICTION

Petitioners assert as basis for Federal court jurisdiction in the first instance that two denials deprived Petitioners of two different Constitutional rights. First, by being denied a public hearing Petitioners were denied their civil rights, 42 USC Sec.1983. Federal district courts have jurisdiction under the statute, 28 USC 1343. Federal jurisdiction exists concurrently with state courts. Petitioners properly initiated litigation in a state court.

The second denial of Petitioners' Constitutional rights, denial of due process, was done by the Texas court system through its summary dismissal of Petitioners' suit seeking an order to compel the City to hold a hearing. As explained elsewhere, this dismissal served to deny due process of law in violation of Amendment XIV of U.S. Constitution.

The subject matter of Petitioners' first cause of action (based on denial of civil rights) involves the right of taxpayers to

a hearing prior to any tax levy by a local government, a well established right guaranteed in the U.S. Supreme Court decision, Londoner v Denver (1908) 210 US 373. The Federal court system has jurisdiction of the subject matter, 42 USC Section 1983. And the Supreme Court has jurisdiction, Londoner case, supra; Arkansas Writers Project Inc. v Ragland, Comm'r of Revenue of Arkansas, No 85-1370, __ US __, decided 04/22/87.

The subject matter of the second cause of action consists of a denial of right to due process, which was done by the dismissal of Petitioners' suit by the Texas court system. Ostensibly, considering the provisions of the Texas Constitution, App. Part 5, an adequate remedy was provided Petitioners under state law in the state court system. The availability of this remedy precluded Petitioners proceeding first in the Federal court system. Creel v City of Atlanta (C.A.Ga., 1968) 399 F2d 777; Fromm v Rosewell (Ct.App. Ill,1985) 771 F2d

1089; Dawson v Childs (CA,Tx,1982) 665 F2d 705.

But here, in reality Petitioners' apparent remedy in the state court system was actually nonexistent, as their suit brought no relief. The dismissal order is invalid; it is contradicted by motions and pleadings in the trial court record. Dismissal by summary judgment was contrary to procedural law, a "a genuine issue as to a material fact" existed. App. Part 6 (Petitioners' eleven page Memorandum asserted that the tax increased by 16.8% [Pg.11]). The City, by denying that fact (App. Part 7, AFFIDAVIT of Juan Garza) made it a disputed fact. See Rule 166-A, TexasRules of Civil Procedure. Elsewhere in trial court proceedings the City actually asserts the existence of a genuine issue as to a material fact (App. Part 7, entitled "RESPONSE", at page 3, Paragraph VII).

The trial court dismissal serves as a precedent, effectively denying relief in the Texas court system not only to Petition-

ers but to all other Texas property owners. Thus, all Texas citizens are denied their civil rights under Section 1983 without any remedy, either in the state court system or the Federal court system. The instant state court proceedings are themselves proof of the inadequacy of any remedy in the state court system. This summary judgment, if not declared a nullity, serves as a precedent to deny taxpayers access to the Texas court system to enforce their civil rights. This state court dismissal violated the right to due process of law under the XIV Amendment, the Federal court system has subject matter jurisdiction. 28 USC Sec.1331. See also Pennzoil v Texaco (1987) 107 S. Ct. 1519, and Railroad Commissioners of Texas v Pullman (1941) 312 US 496, remanding to a Federal district court for additional proceedings.

The U.S. Supreme Court accepted jurisdiction in the recent case of Pennzoil v Texaco, supra, which involved Federal court system jur-

isdiction over state court litigation. The Supreme court should accept jurisdiction in this similar case, from the Fifth Circuit instead of the Second. Presented herein are many issues: scope of Federal judicial system jurisdiction, subject-matter jurisdiction, comity as to state litigation, the relationship of the 11th and 14th Amendments, among others. These issues may be needed in resolution, but they are beyond the scope of this petition.

Like the appeal in the recent Peralta case, the state court judgment rendered here is a nullity, as the judgments deprive litigants of the right to due process. The decision in Peralta is by no means unique. The instant case is like Peralta v Heights Medical Center (1988), supra, wherein a Texas court judgment was void because due process was denied in the Texas court system. The summary judgment, which dismissed Petitioners' state court suit seeking a hearing, served to deny due process of law, and therefore it too is a nullity as in Peralta.

## SUBSTANTIALITY OF THE QUESTIONS PRESENTED

### I- Constitutional Rights Denied

One substantial issue presented here is: Under current law in Texas, taxpayer's civil rights, even though Federally guaranteed, are unenforceable. In our cultural heritage and from our early colonial history, we have had in this nation great respect for the rights of taxpayers. A significant event in provoking the colonists to begin a war of independence was the Boston tea party. That demonstration was a protest of taxpayers who were being taxed while being denied any input into the tax system. The rights of taxpayers have been fought for, and they are valued highly in our country.

The state court dismissal has served to deny taxpayers their civil rights. It may be fairly stated that since 1985, Texas taxpayers have no right to a hearing before levy of an increase in taxes by local government, even if a local property tax be increased by 16.8%, or more. Local officials in Texas, statewide,

refuse to hold public hearings before levying an increase in taxes, as local officials now have a defense. Any suit filed by taxpayers to enforce their civil rights may be dismissed. Local officials need file only a motion for summary judgment, coupled with any kind of affidavit, as here. Consequently, in Texas the taxpayer's civil right to a hearing, as provided by Londoner v Denver, supra, no longer exists. Taxpayers have no recourse or remedy to enforce their civil right, unless, of course, the U.S. Supreme Court orders a hearing held in this proceeding.

The right of taxpayers to a hearing, as established by the U.S. Supreme Court in Londoner, has been voided here by court orders of a state court system. This is a substantial issue worthy of consideration by the U.S. Supreme Court.

II

The second substantial question involves denial of "due process" by a state court. Petit-

ioners' case, asserting a valid Federal civil right and Constitutional law issue, was wrongfully dismissed. The state court, by arbitrarily failing to rule on asserted denials of Constitutional rights, denied those rights to Petitioners. The denial of due process by the state courts is a substantial issue because Petitioners were required to proceed in state courts to enforce their Federally guaranteed rights. The action taken here was an arbitrary dismissal by the state trial court in the beginning, pre-trial. On appeal in the state court system, the denial of due process was sustained.

In the Texas court system arbitrary procedures, such as arbitrary dismissals, are not an uncommon event. The U.S. Supreme Court is aware of the lack of justice in the Texas judicial system. Two recent cases illustrate this. Pennzoil, supra, and Perlata, supra. Admittedly, it is well settled law that state court procedures are generally at the discretion of the states. Further, the application of procedures in state courts is a matter

based on the manner followed in the court system of each state, and this may be done consistently or in an inconsistent manner.

State court procedures, however, cannot be exercised in such a manner as to effect or avoid a Federal right. When a Federal right is involved, minimum standards of due process, as defined by Federal law, must be observed by state courts. As Justice Holmes wrote "Whatever [traps] the State may set for those who are endeavoring to assert rights the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v Wechsler (1923) 263 US 22,24. Presented here is an obvious abuse of discretion by a state trial judge, a frequent event in the Texas judicial system. But what is significant here is that this abuse operated to prevent the enforcement of a Federal right.

The U.S. Supreme Court should establish the rule that such patterns of abuse by state courts are not acceptable when Federal rights

are the subject of litigation. It is proper for the U.S. Supreme Court to inquire into the adequacy of both state procedures and practices, when federal rights and questions are involved. Lawrence v State Tax Commission of Mississippi (1932) 286 US 276,282 and see also Peralta. Enumerated requirements have included "fundamental fairness" and that "the decision of the state court rests upon a fair or substantial basis".

## REASONS FOR GRANTING WRIT

### 1- Misapplication of holding in Feldman

The Court of Appeals for the Fifth Circuit erred in holding Federal district courts have no subjectmatter jurisdiction over cases previously before a state court. Under the proceedings in the lower Federal courts the law as to subjectmatter jurisdiction of Federal courts is now askew. In other similar cases the U.S. Supreme Court has remanded, vesting jurisdiction in lower Federal courts. Railroad Commissioners of Texas v Pullman (1941) 312 US 496; District of Columbia Ct. of Apps. v

Feldman (1983) 460 US 462; Monroe v Pape (1961) 365 US 167,182.

The district court reliance on Feldman is misplaced. The principal issue in Feldman involved whether certain local proceedings "were judicial in nature". The lower court relied principally on a phrase "inextricably intertwined", as if that phrase included the entire substance of Feldman. The accuracy and practicality of that phrase has since been improved upon by Justice Scalia, who recently coined a better substitute phrase:"inextricably integrated with the issue so litigated", Pennzoil v Texaco, supra.

The instant case differs from Feldman, as here there is an absence of an adjudication. Petitioners' suit being dismissed at the outset by a summary judgment. Petitioners' appeal (asserting denial of due process by the trial court) was likewise dismissed summarily without any "adjudication" on the merits. Instead of deciding issues the decision of the state ap-

pellate court discussed at length the controverted, material fact, namely, the tax increase. App. pp. 18-26.

The Court's attention is directed to page 487 of Feldman, the entire page, but note in particular the statement "the District Court does not have jurisdiction over these elements" and "We leave that question to the District Court on remand". Note that in Feldman the Supreme Court held that the Federal district court, as to certain issues, had subjectmatter jurisdiction. In the instant case, unlike in Feldman, there is no "adjudication in the state court" on the cause of action based on denial of civil rights under 42 USC Sec.1983, as Petitioners suit was dismissed at the outset by grant of a motion for summary judgment. Under Texas court decisions the scope of a summary judgment is narrowly limited, as to preclusion and res judicata. The scope of the instant summary judgment is limited: the court's holding is that the "Truth-in-Taxation" statute was not

violated because there was in fact no increase in the City's property tax. The City's motion for summary judgment sought only a limited holding.

2- Preservation of civil rights of taxpayers

The civil rights of taxpayers, as found in Londoner v Denver, should be reinstated for Texas taxpayers. State courts should not be allowed to deprive U.S. citizens of Federally guaranteed rights. The state court litigation has proceeded through the state supreme court, which denied Petitioners' application for writ of error, noting "No Reversible Error" in the lower court judgments.

3- Require state courts to observe Federal due process standards when Federal law issues are being decided

This case provides the Supreme Court with an opportunity to establish minimum procedural standards of due process, to be used by state court systems, at least when state courts are deciding Federal, Constitutional law issues. A

broad general rule has been stated: "persons seeking to vindicate federal rights are to be assured they have been fairly heard". As illustrated by the instant case no adequate remedy was provided here in the state courts, although Petitioners were entitled to relief.

All state court litigation has been completed here by Petitioners. No remand is needed as in the recent Pennzoil case, where state litigation had not been completed. There is no unresolved issue of Texas law, so Younger v Harris (1971) 401 US 37 (abstention) does not require a remand. The state court proceedings, such as they were, being so limited and wrongfully rendered, constituted no adjudication with preclusive effect under "res judicata", to cut off Petitioners' civil rights. Petitioners' cause of action was arbitrarily dismissed by the state courts. The abuse of discretion of the trial judge dismissing this cause of action denied due process of law in violation of U.S. Constitution Amendment XIV.

4- Petitioners' Constitutional Rights

Petitioners have been denied their civil rights by the City of Corpus Christi, and denied due process of law by the Texas court system. These rights must be maintained inviolate. If these Federal rights are to exist, they must be protected by the Federal court system, as was done in the recent Peralta decision. Federal Constitutional rights asserted in state court litigation may be guaranteed in state courts without interruption of state court systems.

5- Resolution of Conflict of Circuits

The Fifth Circuit imposed sanctions on Petitioners for litigating in the Federal court system seeking relief from unConstitutional judgments of a state court system. App. Part 1. But no sanctions were imposed on a similar litigant by the Second Circuit, or by the Supreme Court, in Pennzoil v Texaco, supra. This conflict of law should be resolved.

For these reasons Petitioners respect-

fully request the issuance of a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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88-1478

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**CORPUS CHRISTI TAXPAYERS ASSOCIATION, TOM HUNT and JOE O'BRIEN,**

**Petitioners**

—against—

**CITY OF CORPUS CHRISTI, TEXAS and STATE OF TEXAS,**

**Respondents**

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# PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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## APPENDIX

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5 pp

No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1988

**Corpus Christi Taxpayers Association,**
**Tom Hunt and Joe O'Brien,**
**Petitioners**
—against—
**City of Corpus Christi, Texas and State of Texas,**
**Respondents**

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| *Brinkerhoff-Faris Trust & Savings v Hill* (1930) 281 US 673. | |
| *Davis v Wechsler* (1923) 263 US 22,24 | |
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| *Dist. Col. Ct. of App. v Feldman* (1983) 103 S.Ct. 13037 | |
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| *Londoner v Denver* (1908) 210 US 373 | |
| *Monroe v Pope* (1961) 365 US 167,182 | |
| *Pennzoil v Texaco* (1987) 107 S. Ct. 1519 | |
| *Perlata v Heights Medical Center, Inc.* (No. 86-1430, Decided Februray 24, 1988) 56 Law Week pp. 4189-4191 | |
| *Railroad Commissioners of Texas v Pullman* (1941) | |
| *Younger v Harris* (1971) 401 US 37 | |
| *U.S. Constitution:* | |
| Article III, Section 2 of the U.S. Constitution | |
| Amendment XIV, Article 1, U.S. Constitution | |
| *Federal statutes:* | |
| 28 USC Sec. 1254 (1) | |
| 28 USC Sec. 1257(3) | |
| 42 USC Section 1983 | |
| *Texas law:* | |
| Texas Constitution, Article 8, Section 21 | |
| Texas Rules of Civil Procedure, Rule 166A | |

**CORPUS CHRISTI TAXPAYER'S v. CORPUS CHRISTI, TEX.**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, et al.,**
**Plaintiffs-Appellants, Cross-Appellees,**

**v.**

**CITY OF CORPUS CHRISTI, TEXAS,**
**Defendant-Appellee, Cross-Appellant,**

**State of Texas, Defendant-Appellee.**

**No. 87-6141**
**Summary Calendar.**
United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1988.

Taxypayers brought civil rights complaint under § 1983, in which they challenged city ordinance which allegedly increased their tax rate as violative of due process rights. The United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., entered summary judgment dismissing suit, and taxpayers appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) district court was without jurisdiction to entertain taxpayers' due processs challenge, inasmuch as challenge was nothing more than attempt to collaterally attack judgment entered in state court; (2) taxpayers' action was barred by principles of res judicata; (3) district court should have provided some explanation on record as to why it was denying defendants' motion for Rule 11 sanctions; and (4) city was entitled to damages and double costs under "frivolous appeal" rule.

Affirmed in part; vacated in part and remanded.

**1. Judgment 828(3.4)**

District court was without jurisdiction to entertain taxpayers' due process challenge to city's tax ordinance, where constitutional claims had previously been raised in taxpayers' state court action, and federal action was nothing more than attempt to collaterally attack judgment entered in state court. U.S.C.A Const.Amend 14.

**2. Judgment 828(3.11)**

Civil rights complaint filed by taxpayers, in which taxpayers again raised same due process challenge to city's tax ordinance previously rejected by state trial court when it entered take-nothing

judgment, was barred by principles of res judicata. U.S.C.A. Const.Amend. 14.

**3. Judgment 588**

Bar of res judicata extends to all legal theories which would support recovery in respect to same nucleus of operative facts.

**4. Federal Civil Procedure 2721**

District court should have provided some explanation on record as to why it was denying defendant's motion for Rule 11 sanctions, where plaintiff's action was clearly barred under principles of res judicata, and face of record appeared to warrant Rule's application. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**5. Federal Courts 813**

Court of Appeals reviews denial of Rule 11 sanctions under "abuse of discretion" standard. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

**6. Federal Civil Procedure 2721**

District court abuses its discretion if it finds Rule 11 violation and does not impose some form of sanctions. Fed. Rules Civ.Pro.Rule 11, 28 U.S.C.A.

**7. Federal Civil Procedure 2721**

Although district court need not routinely provide findings and conclusions in Rule 11 cases, court must provide some explanation on record for its denial of requested Rule 11 sanctions when face of record appears to warrant Rule's application. Fed.Rules Civ.Pro.Rule 11, 28 U.S.C.A.

**8. Federal Civil Procedure 2747**

City was entitled to damages and double costs under "frivolous appeal" rule, where taxpayers had no basis for appealing due process challenge that was properly dismissed under principles of res judicata. F.R.A.P. Rule 38, 28 U.S.C.A.; U.S.C.A. Const.Amend. 14.

**9. Attorney and Client 24**

Taxpayer's attorney would be held personally liable for damages and double costs assessed against taxpayers where their pursuit of frivolous appeal from district court's dismissal of action which was clearly barred on res judicata grounds. F.R.A.P. Rule 38, 28 U.S.C.A.; 28 U.S.C.A. § 1927.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN, GARWOOD, and DAVIS, Circuit Judges:

GARWOOD, Circuit Judge:

Plaintiffs-appellants Corpus Christi Taxpayer's Association, Tom Hunt and Joe O'Brien (the plaintiffs or the Taxpayers) appeal the district court's dismissal, pursuant to summary judgment, of their suit, which they appear to have attempted to bring under 42 U.S.C. § 1983, against defendants-appellees City of Corpus Christi, Texas (the City) and the State of Texas (the State). The City cross-appeals the district court's denial of its motion for sanctions under Fed.R.Civ.P. 11. The City also requests sanctions for frivolous appeal under Fed.R.App.P. 38 and 28 U.S.C. § 1927. On the merits, we hold that the district court correctly dismissed the suit. We also hold that the City is entitled to relief for frivolous appeal under Rule 38 and section 1927, and that the district court should reconsider its Rule 11 ruling.

**Facts and Proceedings Below**

The Taxpayers' amended complaint below complained of a denial of due process concerning the City's 1984 tax ordinance, in two respects. First, it was alleged that this ordinance increased the tax rate imposed by the City over that prevailing in 1983 and that, accordingly, under the Texas statutes and Constitution, and under the United States Constitution, the plaintiffs were entitled to have a public hearing by the City on the 1984 ordinance, but no such hearing was afforded. Second, it was alleged that after being deprived of such a hearing by the City, the Taxpayers filed suit against the City in the proper state trial court complaining of that denial, that both parties filed motions for summary judgment, that the state trial court granted the City's motion and that that was error because there were disputed questions of fact, and that the Taxpayers were not afforded a proper hearing. The Taxpayers further alleged that they appealed the state trial court's adverse judgment to the state court of appeals, which affirmed the trial court's judgment, 716 S.W.2d 578, and that they thereafter appealed the case to the Texas Supreme Court, which on December 17, 1986 refused the Taxpayers' application for writ of error so that the decisions of the state trial court and of the state court of appeals became final.

The Taxpayers further alleged in the present suit that "[t]he combined action of the City and the courts of the State of Texas has

served to deprive Plaintiffs of the right to a public hearing, and the right to other hearings allowed under due process of law." The plaintiffs prayed for relief, including a declaration "that the City and State of Texas proceedings here complained of are invalid and void" as contrary to the Fourteenth Amendment of the United States Constitution. It is unquestioned that this reference to "proceedings here complained of" included all the state court proceedings described in the complaint. The complaint also sought a judgment declaring "invalid that portion of the [City's] tax levy in 1984 that exceeded the 1983 tax levy by the City" and ancillary relief, including attorneys' fees.

The City filed a motion to dismiss or for summary judgment on the grounds, among others, that the federal district court lacked jurisdiction because the essence of the plaintiffs' suit was an attempt to revise or modify the state court judgments and that, in any event, the suit was barred by the doctrine of *res judicata.* The State similarly resisted the suit, alleged it had not given its consent to be sued, had immunity under the United States Consititution, and that it was not a "person" for purposes of section 1983. The City, in connection with its motions, furnished the district court copies of the pleadings, judgment, and other relevant papers in the state action. The plaintiffs furnished no meaningful evidentiary response to the City's motion.

In a well-considered opinion supported by numerous authorities cited, the district court held that it lacked subject matter jurisdiction because the plaintiffs, regardless of how they labeled their claim, in substance sought review of the state court judicial proceedings or matters arising out of those proceedings. Alternatively, the district court ruled that the plantiff's suit was barred by *res judicata* on account of the final judgment in the state court suit. We agree, largely for the reasons stated by the district court.

**1.** In their reply brief on appeal, the plaintiffs have since stated that they withdraw this request for relief.

**Discussion**

**[1]** The plaintiff's state court suit specifically complained that the City's 1984 tax ordinance had raised the tax rate over that for 1983, but that the City had not afforded a public hearing in connection therewith as was required by the Texas statutes and Constitution. The plaintiffs' state court pleading, in its paragraph XX, further specifically alleged that the City's conduct in this connection, as alleged elsewhere throughout that pleading, deprived

the plaintiffs of property and liberty without due process of law in violation of the Texas Constitution "and the Fourteenth Amendment to the United States Constitution." In paragraph XXI of their state court pleading, the plaintiffs also complained that the Texas Property Tax Code is unconstitutional and void and deprives the plaintiffs of property and liberty "contrary to. . . the Fifth and Fourteenth Amendment[s] to the United States Constitution." Among the relief the plaintiffs sought in the state suit was a declaration that the City's 1984 and 1985 tax ordinances "are unconstitutional," that the City's 1984 tax is illegal and void, that a portion of the Texas Property Tax Code is unconstitutional and void, and a mandatory injunction demanding that the City set the proper tax rate.

The state trial court judgment decreed that the plaintiffs take nothing from the City and denied all relief requested by the plaintiffs. This judgment was rendered in response to the motion for summary judgment of the City. Apparently the City's motion was founded on the proposition that the 1984 tax ordinance did not increase the tax rate. The plaintiffs appealed to the state court of appeals, contending that summary judgment was improper because there was a disputed fact issue as to whether the taxes had been increased, and also complaining that the state trial court should not have rendered a take-nothing judgment as to their entire suit because the City's motion for summary judgment did not expressly address their constitutional claims. The court of appeals affirmed, noting that the undisputed summary judgment evidence demonstrated there was no tax increase, and the plaintiffs had not, as they should have, opposed the summary judgment on the grounds that it did not properly reach their constitutional claims. Thereafter, the plaintiffs asserted essentially those same two arguments to the Texas Supreme Court, which refused to review the case, with the result that the state trial court judgment became final.

It is clear that the state trial court judgment was one on the merits, and ruled adversely to the plaintiffs on all of their claims, decreeing they take nothing by their suit. Since the plaintiffs' state court pleadings clearly raised the same constitutional complaints about the 1984 tax ordinance that the plaintiffs seek to raise in their present federal suit, it is evident that this aspect of the present suit is nothing but an attempt to challenge the validity of the state trial court judgment that the 1984 tax ordinance did not violate the plaintiffs' federal constitutional rights. However, such an attack can only be made by review in the United States Supreme Court

under 28 U.S.C. § 1257 and the district court had no jurisdiction to entertain such an attack. *Carbonell v. Louisiana Department of Health & Human Resources,* 772 F.2d 185, 188 (5th Cir.1985). This conclusion likewise applies to the only other claim asserted in the complaint, namely, that the state trial court erred by rendering summary judgment when the facts were disputed, and by rendering a take-nothing judgment as to the plaintiffs' entire suit when the City's motion for summary judgment had been founded only on the no tax increase theory. Again, if the state trial court erred in this respect, the plaintiffs' remedy was to cure that error by appeal through the Texas courts and ultimately to the United States Supreme Court, and not by an independent proceeding in the federal district court. *See, e.g., Lampkin-Asam v. Supreme Court of Florida,* 601 F.2d 760 (5th Cir.1979), *cert. denied,* 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d (1980).

**[2,3]** Moreover, it is evident that the plaintiffs' federal suit is barred by *res judicata.* The same claim of invalidity of the City's 1984 tax ordinance, which is made in this federal suit, was included in the state suit, and the state court judgment, by decreeing that the plaintiffs take nothing by their suit, clearly determined that claim on the merits and adversely to the plaintiffs. The plaintiffs in this federal suit are the same parties who were plaintiffs in the state suit, and the City is a defendant in the federal suit as it was also a defendant in the state suit.[2] Therefore, the plaintiffs' claim against the City that the City's 1984 tax ordinance violated their rights under the United States Constitution is barred by *res judicata.* The plaintiffs say that this is not so because the state trial court did not expressly rule on their constitutional claims. However, the state trial court's judgment does not state the basis of its ruling, but rather merely renders judgment that the plaintiffs take nothing by their suit. The judgment is plainly on the merits as to all of the plaintiffs' claims in that suit. Indeed, the bar of *res judicata* extends to all legal theories which would support recovery in respect to the same nucleus of operative facts. Under our decisions in *Gregory v. Drury,* 809 F.2d 249, 253-54 (5th Cir.1987), and *Flores v. Edinburg Consolidated I.S.D.,* 741 F.2d 773 (5th Cir.1984), the state trial court judgment is plainly preclusive of the present suit. *See also, e.g., Segrest v. Segrest,* 649 S.W.2d 610, 612 (Tex.1983).

We accordingly affirm the district court's dismissal of the plaintiffs' suit.

2. It is true that the State, a named defendant in the present federal suit, was not a party to the prior state suit. However, the State is clearly immune from federal court suit under the Eleventh Amendment and is not a "person" for purposes of section 1983. Therefore, dismissal of the State also mandated on these grounds.

**[4]** We turn now to the City's cross-appeal, complaining of the district court's denial of its request for sanctions under Fed.R.Civ.P. 11. Promptly after the plaintiffs' suit was filed, the City moved for dismisssal and also for Rule 11 sanctions. The case remained pending for approximately seven more months, during which time numerous motions and the like were filed. The City clearly and adequately disclosed the baselessness of the plaintiffs' suit, but the plaintiffs nevertheless persisted in it. The district court's order on the motion for sanctions does not state whether or not a Rule 11 violation was found, but merely concludes that "sanctions should be denied" without stating any reasons. Nor does anything in the transcript of the sanctions hearing reflect any basis for the district court's action. Here, the basis for sanctions is not a failure to investigate the facts, as these have all along been essentially fully known to all parties and undisputed insofar as they are material to the viability of the plaintiffs' federal suit. Rather, the sanctions motion poses the question of whether the plaintiffs' original and amended complaint, and the plaintiffs' various motions, were submitted without "reasonable inquiry" as to whether the document "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed.R.Civ.P.11.

**[5-7]** The district court's order denying sanctions was rendered before, and therefore without the benefit of, our decision in *Thomas v. Capital Security Services, Inc.,* 836 F.2d 866 (5th Cir.1988) (en banc). Under *Thomas,* we review a denial of Rule 11 sanctions under an abuse of discretion standard. *Id.* at 872. However, a district court abuses its discretion if it finds a Rule 11 violation and does not impose some form of sanctions. *Id.* at 876. Although this Court does not routinely require district court findings and conclusions in Rule 11 cases, the record must reflect some reason for the court's denial of the requested Rule 11 sanctions when the face of the record appears to warrant the Rule's application. *Id.* at 883. That is the situation here. The Taxpayers' legal arguments in support of their federal suit are not warranted by existing law or any good faith argument for its extension, modification, or reversal. It is impossible to tell whether or not the district

court found there was a Rule 11 violation. If it found a Rule 11 violation, but nevertheless declined to impose any sanctions, that would be contrary to *Thomas.* On the other hand, if the court found there was no Rule 11 violation, then, at the least, in light of this record, the district court was called on to make some explanation on the record of why it reached that conclusion.

Accordingly, we vacate the district court's denial of sanctions and remand that aspect of the case to the district court for reconsideration and further action in accordance with this opinion and *Thomas.*

**[8,9]** We next turn to the City's motion in this Court seeking damages and double costs on appeal under Fed.R.App.P. 38, and requiring the Taxpayers' counsel to personally satisfy such excess costs pursuant to 28 U.S.C. § 1927. We conclude that the Taxpayers' appeal involves legal points not arguable on their merits, and that the appeal is accordingly frivolous. The City is thus entitled to its Rule 38 costs reasonably incurred on this appeal. *See United States v. One Parcel of Real Property,* 831 F.2d 568, (5th Cir.1987); *Hale v. Harney,* 786 F.2d 688, 692 (5th Cir.1986); *Hagerty v. Succession of Clement,* 749, F.2d 217 (5th Cir.1984); *News-Texan, Inc. v. City of Garland, Texas,* 814 F.2d 216, 221 (5th Cir.1987). The City is also entitled to relief against the Taxpayers' counsel personally for the unreasonable and vexatious multiplication of these proceedings by the Taxpayers' appeal to this Court and their various motions filed in connection therewith. 28 U.S.C. 1927; *One Parcel,* 831 F.2d at 568-69; *Harney,* 786 F.2d at 692; *McGoldrick Oil Co. v. Campbell, Athey & Zukowski,* 793 F.2d 649, 653-54 (5th Cir.1986); *Olympia Co., Inc. v. Celotex Corp.* 771 F.2d 888, 892-94 (5th Cir.1985).

Accordingly, we grant the motion of the City for damages under Fed.R.App.P. 38, but remand to the district court for determination of the proper amount, namely, the reasonable attorneys' fees and other expenses reasonably incurred by the City by virtue of this appeal. We also grant the City's motion to assess such costs against the Taxpayers' counsel personally, under 28 U.S.C. § 1927, so that he or they will be liable for them personally as well as the Taxpayers' being liable therefor. On remand, the district court should determine the amount of excess costs incurred by virtue of this appeal. The district court shall also apportion the amounts awarded as between the Taxpayers and their counsel. *See Harney,* 786 F.2d at 692; *Olympia Co.,* 771 F.2d at 894.[3]

3. The Taxpayers also request Fed.R.App.P. 38 and 28 U.S.C. § 1927 relief against the City and its counsel. This request is frivolous and is denied. Rule 38 is inapplicable because the City is an appellee. As to section 1927, it is the Taxpayers and their counsel, and not the City or its counsel, which has unreasonably and vexatiously multiplied these proceedings.

**Conclusion**

We affirm the district court's dismissal of the plaintiffs' suit. We vacate the district court's denial of the City's motion for Fed.R.Civ.P. 11 sanctions, and we remand the matter of Rule 11 sanctions to the district court for further proceedings consistent herewith and with *Thomas*. We deny the motions of the plaintiffs for relief under Fed.R.App.P. 38 and 28 U.S.C. § 1927. We grant the motions of the City under Fed.R.App.P. 38 and 28 U.S.C. § 1927 for damages and excess costs by reason of this appeal, and we remand that matter to the district court to determine the amount of such damages and excess costs and to apportion the same between the Taxpayers and their counsel.

AFFIRMED in part; VACATED in part and REMANDED.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 87-6141**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, ET AL.,**
**Plaintiffs-Appellants-Cross-Appellees,**

**versus**

**CITY OF CORPUS CHRISTI, TEXAS,**
**Defendant-Appellee-Cross Appellant,**

**STATE OF TEXAS,**
**Defendant-Appellee.**

**Appeal from the United States District Court for the Southern District of Texas**

**ON SUGGESTION FOR REHEARING EN BANC**

**(Opinion 08-22-88), 5 Cir., 198__, _____F.2d____)**
**(October 14, 1988)**

Before RUBIN, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Ruls of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

**IN THE DISTRICT COURT OF THE UNITED STATES**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**CORPUS CHRISTI DIVISION**

**C.A. NO. C-87-6**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, ET AL.**
**CITY OF CORPUS CHRISTI, TEXAS, ET AL.**

**ORDER GRANTING MOTION TO DISMISS**

Defendants, City of Corpus Christi and State of Texas, move to dismiss this cause for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), Fed. R. Civ. P. That motion is hereby granted.

Plaintiffs originally brought suit in the 148th District Court of Texas seeking injunctive and declaratory relief against the City of Corpus Christi and the Attorney General of the State of Texas, attacking the calculation and imposition of taxes levied by the Defendant City. In their complaint, Plaintiffs contested the validity of the data used and the method by which the City calculated the effective tax rate for 1984. Plaintiffs alleged that if the taxes had been properly calculated pursuant to ch. 26, TEX. TAX CODE ANN. (Vernon 1982), an increase in taxes over the previous year would have been reflected, thereby triggering the city taxpayers' right to a public hearing under the *Tex. Const.*, art. VIII, § 21(a).

Plaintiffs also asserted that Ch. 26 of the Tax Code ws unconstitutionally vague, because it failed to specify the method of calculation to be used by a taxing entity. As a result of the City's taxing policy, the Plaintiffs stated they had "been deprived of 'property' and 'liberty' without due case of law in violation of Art. 1, § 19, Constitution of the State of Texas, and *the Fourteenth Amendment to the United States Constitution.*" Plaintiffs' Third Amended Original Petition for Declaratory and Injunctive Relief, Paragraph XX (emphasis added).

In its motion for summary judgment presented to the state trial court, the Defendant City asserted two points. First, the City argued that it had complied with § 26.04 of the Texas Tax Code, and the City did not exceed the calculated effective rate for the tax year 1984, but in fact had imposed a lower rate. Second, the City argued that no genuine issue of material fact existed, and it was entitled to summary judgment as a matter of law because it did not exceed the calculated effective rate so as to trigger the notice and hearing provisions of the Tax Code and the Texas Constitution.

The state trial court granted the Defendants' motion for sum-

mary judgment. Plaintiffs appealed to the 13th Court of Appeals of the State of Texas. That court, in a detailed opinion, affirmed the trial court. After reviewing how the tax at issue was calculated, the appellate court agreed that there had been no increase in the effective tax rate over the previous years, and the City was in compliance with § 26 of the Texas Tax Code. Since there had been no tax increase, the Court did not address the public hearing requirements of the Texas Constitution.

As to the Plaintiffs' argument that § 26 of the Texas Tax Code was unconstitutionally vague, the appellate court first noted that the Plaintiffs had made no response to the Defendants' motion for summary judgment, relying solely on their pleadings. After stating acts of the State Legislature warranted a presumption of constitutionality, the Court concluded that because Plaintiffs had failed to properly present any argument or authority on the purported illegality of the Tax Code, the issue was not properly before the appellate court.

Appeal was thereafter taken by the Plaintiffs to the Texas Supreme Court, which, on December 17, 1986, refused the application for writ of error, with the notation "no reversible error."

Plaintiffs now come before this Court, alleging denial of state and federal constitutional due process because they were denied a hearing under the Texas Constitution. They also attack the constitutionality of the state court proceedings themselves. In their first amended complaint, Plaintiffs allege federal jurisdiction pursuant to 28 U.S.C. § 1441, a removal statute, or 28 U.S.C. § 1331, the federal question statute.

Title 28, United States Code, § 1441 is not a independent jurisdictional ground. It is a removal statute, and as such will not support jurisdiction where there is no current state court case involved that could be removed. *See* 28 U.S.C. § 1441. It is elementary that only the defendants in an action can remove a case, not a plaintiff, *Chicago, R.I.&P.R. Co. v Stude,* 74 S.Ct. 290 (1954); therefore, 28 U.S.C. § 1441 will not properly support jurisdiction over this case.

Alternatively, the Plaintiffs allege 28 U.S.C § 1331 as a jurisdictional basis. They allege that they have had their federal constitutional rights violated because of the "combined action of the City and the courts of the State of Texas has served to deprive Plaintiffs of the right to a public hearing, and the right to other hearings allowed under due process of law." Plaintiffs' First Amended Complaint, § IV, No. 14. As a remedy, Plaintiffs request, among other things, "an order declaring that the City and State

of Texas proceedings. . .are invalid and void, as being contrary to the U.S. Constitution, Article XIV." *Id.* at § V, No. 2. In actuality, what the Plaintiffs ask the Court to do is review the previous state court decisions in which the Plaintiffs presented virtually identical issues to the courts of the State of Texas, but were unsuccessful. This Court lacks jurisdiction to conduct that exercise.

It is well-settled law that "the federal district court, as a court of original jurisdiction, lacks appellate jurisdicton to review, modify, or nullify a final order of the state court." *Lampkin-Assam v. Supreme Court of Florida,* 601 F.2d 760 (5th Cir. 1979) (citations omitted). The Fifth Circuit has held on many occasions that federal district courts do not have jurisdiction under 42 U.S.C. § 1983 or any other theory to reverse or modify the judgments of state courts. *Carbonell v. La. Dept. of Health & Human Resources,* 772 F.2d 185, 188 (5th Cir. 1985); *Kimball v. Florida Bar,* 632 F.2d 1283, 1284 (5th Cir. 1980); *Lampkin-Assam,* 601 F.2d at 760; *Cheramie v. Tucker,* 493 F.2d 586, 589 (5th Cir.), *cert. denied,* 95 S.Ct. 126 (1974); *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Carter v. Duggan,* 455 F.2d 1156, 1158 (5th Cir. 1972); *Aris v. Big Ten Taxi Corp.,* 441 F.2d 536 (5th Cir. 1971); *O'Connor v. O'Connor,* 315 F.2d 420, 422 (5th Cir. 1963); *Warriner v. Fink,* 307 F.2d 933 (5th Cir. 1962), *cert. denied,* 83 S.Ct. 937 (1963); *Hanna v. Home Insurance Co.,* 281 F.2d 298, 303 (5th Cir. 1960), *cert. denied,* 81 S.Ct. 751 (1961); *Manufacturers Record Publishing Co. v. Lauer,* 268 F.2d 187 (5th Cir.), *cert. denied,* 80 S.Ct. 258 (1959); *Williams v. Tooke,* 108 F.2d 758 (5th Cir.), *cert. denied,* 61 S.Ct. 8 (1940). Only the United States Supreme Court can review allegedly unconstitutional decisions by a state court. 28 U.S.C. § 1257: *District of Columbia Court of Appeals v. Feldman,* 103 S.Ct. 1303, 1315 n.16 (1983). *See Pennzoil Co. v. Texaco, Inc.,* 107 S.Ct. 1519, 1533 (1987) (Marshall, J., concurring).

The federal due processs deprivations now being advanced by the Plaintiffs are identical to those already adjudicated by the Texas state courts. In Plaintiffs' state court complaint, they alleged due process and liberty deprivations under the United States Constitution. That is exactly what the Plaintiffs allege in this action. As illustrated by the previously cited cases, this Court is powerless to sit in review of those state court decisions.

In Plaintiffs' response to Defendants' motions, they argue that the action they pursue in this Court is not an appeal of previous state court decisions, but a separate 42 U.S.C. § 1983 cause of action arising out of the denial of due process as a result of the state judicial proceedings. Regardless of how the Plaintiffs wish to label their

cause, the result is the same—Plaintiffs seek review by this Court of judicial proceedings, or matters arising out of those proceedings, already completed by the courts of the State of Texas. It is the "nature of the underlying claim, not the nature or basis of the desired relief, [that] directs the answer to the appellate versus original jurisdiction inquiry." *Carbonell,* 772 F.2d at 189. When a plaintiff presents federal claims that are "inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's [state law claim], then the district court is in essence being called upon to review the state court decision. This the district court may not do." *Id.* (quoting *Feldman,* 103 S.Ct. at 1315 n.16).

In *Carter v. City of Fort Worth,* 456 F.2d 572 (5th Cir. 1972), the situation was very similar to that now facing the Court. After the plaintiffs had already tried and failed in state court to have particular constitutional and statutory state provisions declared unconstitutional, the court stated the following:

> *[F]ederal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts.*
>
> The plaintiffs here chose the state court as the forum to litigate the very issue they are now presenting to this court. After having had their day in court, they want to re-litigate their case here. [We have already] held that under circumstances similar to those in this suit, the appropriate action was to dismiss the cases for lack of jurisdiction.

*Id.* at 575 (emphasis added) (quoting the district court opinion). *See also Reynolds v. State of Georgia,* 640 F.2d 702 (5th Cir. 1981) (holding that federal district court lacked subject matter jurisdiction where plaintiff alleged denial of due process and right to jury trial as a result of the state trial court granting summary judgment and subsequent unsuccessful state appeals).

Even if this Court was not without subject matter jurisdiction in this cause, the Plaintiffs' claims would nevertheless be barred under the doctrine of *res judicata.* The Fifth Circuit has recently reiterated "that issues actually litigated are barred in subsequent suits between the parties, even though a different cause of action is asserted; that when the subsequent suit asserts the same cause of action issues that might have been litigated are precluded as well." *Gregory v. Drury,* 809 F.2d 249, 253-54 (5th Cir. 1987). *See Segrest v. Segrest,* 649 S.W.2d 610, 612 (Tex. 1983). Plaintiffs have presented this Court with virtually the identical cause of action presented to the state courts. The parties and subject matter are

identical. The issues, if not identical, are at the least very similar. Nothng new being sought here by the Plaintiffs, their cause would therefore be barred by *res judicata.*

Because the Plaintiffs have failed to allege a valid jurisdictional basis for their cause of action in this Court, Defendants' motion to dismiss for lack of subject matter jurisdiction is hereby granted.

ORDERED this 9th day of October, 1987.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

NO. 84-4323-E

IN THE DISTRICT COURT
148TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

CORPUS CHRISTI TAXPAYERS ASSOCIATION,
TOM HUNT AND JOE O'BRIEN
vs.
CITY OF CORPUS CHRISTI

SUMMARY JUDGMENT

BE IT REMEMBERED, on the 1st day of October, 1985, came on to be heard the Motion of Defendant City of Corpus Christi for Summary Judgment as a matter of law and the court having considered said Motion, supporting Affidavits, Depositions, Answers to Interrogations, and other discovery on file herein, and having considered argument of counsel, is of the opinion and hereby finds that Defendant City of Corpus Christi is entitled to a Summary Judgment as a matter of law.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiffs Corpus Christi Taxpayers Association, Tom Hunt and Joe O'Brien take nothing from Defendant City of Corpus Christi and said Defendant is entitled to Judgment as a matter of law. The City of Corpus Christi is hereby dismissed from this lawsuit with its costs.

All other requested relief not granted herein is denied.

All costs are assessed against Plaintiffs, Corpus Christi Taxpayers Association, Tom Hunt and Joe O'Brien, for which let execution issue if not timely paid.

Signed this the 7th day of October, 1985.

Judge Presiding

**COURT OF APPEALS**
**Thirteenth Judicial District**
**Corpus Christi, Texas**

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the **29th day of August, 1986.** If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-86-023-CV (Tr. Ct. No. 84-4323-E)
CORPUS CHRISTI TAXPAYER'S ASSOCIATION,
J. E. O'BRIEN AND TOM HUNT, Appellants,
V.
THE CITY OF CORPUS CHRISTI, Appellee.
on appeal to this Court from Nueces County, Texas.

**JUDGMENT**

On appeal from the 148th District Court of Nueces County, Texas, from a judgment signed October 7, 1985. Opinion by Justice Fortunato P. Benavides. Opinion ordered published. TEX. R. CIV. P. 452.

THIS CAUSE was submitted to the Court on May 15, 1986, on oral argument, briefs and the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellants, CORPUS CHRISTI TAXPAYER'S ASSOCIATION, J. E. O'BRIEN and TOM HUNT.

Costs of the appeal are adjudged against appellants, CORPUS CHRISTI TAXPAYER'S ASSOCIATION, J. E. O'BRIEN and TOM HUNT, and Fred Paciotti and Vern Shirley as sureties on the appeal bond. It is further ordered that this decision be certified below for observance.

BETH A. GRAY, CLERK

Appendix Item "f"

**NUMBER 13-86-023-CV**
**COURT OF APPEALS**
**THIRTEENTH JUDICIAL DISTRICT OF TEXAS**
**CORPUS CHRISTI**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, J. E. O'BRIEN AND TOM HUNT, ET AL.,**
**Appellants,**
**v.**
**THE CITY OF CORPUS CHRISTI,**
**Appellee.**

**On appeal from the 148th District Court of Nueces County, Texas.**

**Before Fortunato P. Benavides, Norman L. Utter, and J. Bonner Dorsey, J.J.**

## OPINION

This is an appeal from a summary judgment. We affirm[1].

Appellants sued the City of Corpus Christi (the City) and the State of Texas for injunctive and declaratory relief, contesting the validity of the data used and the method by which the City calculated the effective tax rate for 1984, as required by TEX. TAX CODE ANN. Ch. 26 (Vernon 1982). Appellants also asserted that Tax Code Chapter 26 is unconstitutional, alleging the statute is so vague as to be unenforceable because it fails to specify the method of calculation to be used by taxing entity.

1. Appellee's motion to dismiss for mootness, carried with this case, is overruled.

The trial court granted summary judgment for the City, and ordered that appellants take nothing. Appellants bring four points of error.

In its motion for summary judgment, the City asserted a right to summary judgment on the basis that: (1) the City complied with the Texas Tax Code § 26.04 requirements since the City did not exceed the calculated effective tax rate for the tax year 1984, but in fact imposed a tax rate lower than the calculated effective tax rate; and (2) no genuine issue of material fact exists, since all facts necessary to determine this case are contained in the summary judgment evidence, and the City is entitled to summary judgment

as a matter of law because it did not exceed the calculated effective rate so as to trigger the tax code notice and hearing provisions.

As outlined in the State Property Tax Board's report, *Statement,* March 1985, Vol. 7, No. 9, a taxing unit's effective tax rate, calculated each year under the truth-in-taxation requirements of § 26.04, establishes a benchmark for tax increases. The taxing unit must comply with the notice and hearing requirements of Tex. Const. Art 8 § 21, as well as Tax Code § 26.04.

The tax rate and the calculations used to obtain the rate are published along with the City's unencumbered fund balances prior to the City's adoption of an actual tax rate. If the proposed tax rate exceeds the effective tax rate by more than three percent (3%), the City must publish a newspaper notice and hold a public hearing on the proposed increase. TEX. TAX CODE ANN. §§ 26.05, 26.06 (Vernon 1982). If the City's adopted tax rate exceeds the effective rate by more than eight percent (8%), voters may petition for an election to reduce the limit the rate to 8% above the effective rate. TEX. TAX CODE ANN. § 26.07 (Vernon 1982).

The total tax rate is composed of two parts: (1) the debt portion also called bonded indebtedness, or interest and sinking fund (I & S) rate, which generates the tax revenue needed to pay principal and interest on certain debts in the coming year, and (2) the maintenance and operation (M & O) rate, which generates the remaining taxes needed for current operations.

In calculating the effective rate, the previous year's rates are used to project the proper debt rate for the coming year. The I & S and M & O figures are dealt with separately, then added together at the end to determine the total effective tax rate. After the effective tax rate has been calculated, three items of information must be published so as to apprise the property owners of:

(1) the effective tax rate, calculated according to § 26.04:

(2) the calculations used to determine the effective tax rate; and

(3) the estimated amount of I & S fund balance and estimated amount of M & O fund balance remaining at the end of the current fiscal year.

No particularized form or specifications, in providing such apprisement by publication or advertisement of the effective rate and its calculations, are found in the Tax Code. Also, the Tax Code does not state whether the governing body must actually adopt the projected debt rate.

In a summary judgment proceeding, the burden of proof is on the movant to establish his right to a summary judgment on the

issues expressly presented to the trial court by proving all essential elements of his cause of action or defense as a matter of law. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979); Floyd v. Willacy County Hospital Dist., 706 S.W.2nd 731, 734 (Tex. App.—Corpus Christi 1986, no writ).

By their first point of error, appellants claim that appellee failed to establish its entitlement to a summary judgment as a matter of law because it failed to prove that its calculations of the effective tax rate were correct. Appellants assert that the City was required to prove that the *data* used in its calculations was correct, but only presented proof as to the *method* of calculation.

Appellee's summary judgment evidence consisted of: (1) the affidavit of Juan Garza, the City Director of Finance; (2) the City's "Notice of Calculation of Effective Tax Rate and Publication of Estimated Unencumbered Fund Balances" and "Calculations Used to Determine Effective Tax Rate" for the tax years 1982 through 1984, calculated on forms supplied by the State Property Tax Board; (3) City Ordinances for tax years 1982-1984 implementing the actual tax rates; and (4) depositions of J. Robert Massengale, Assistant City Manager of Financial Services for Lubbock; Stuart D. Summers, Director of the Budget and Research Department for San Antonio; and Richard Petree, Chief Appraiser and Tax Assessor-Collector for the Taylor County Appraisal District.

In his affidavit, Garza stated that for the tax year 1984, the City calculated and published an effective tax rate of $0.57065 per $100.00 valuation, but that the City actually adopted a tax rate of $0.565 per $100.00 valuation, therefore not violating the truth-in-taxation requirements of the Property Tax Code. Garza also stated that Exhibit 1, attached to his affidavit, is a true and correct copy of the 1984 calculation of the Effective Tax Rate for the City, as published on July 30, 1984.

Proof of the City's tax records raises a presumption that there was a valid levy and assessment of appellants' tax liabiltiy, made by a legally constituted taxing authority, and that all conditions precedent to the levy and assessment were performed. Houston Lighting & Power Co. v. Dickinson, 641 S.W.2d 302, 306 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). The City must substantially comply with the requisite procedures exacted by statute in order to arrive at a valid tax levy. *Id.* Failure to comply with statutory directives in assessing taxes voids the assessment. Lumberton Municipal Utility District v. Cease, 596 S.W.2d 601, 604-5 (Tex. Civ. App.—Beaumont 1980, no writ); Federal Land Bank of

Houston v. State, 314 S.W.2d 621, 630 (Tex. Civ. App.—Amarillo 1958), *rev'd on other grounds,* 329 S.W.2d 847 (1959).

In Birdwell v. City of Boyd, 233 S.W.2d 603, 605 (Tex. Civ. App.—Fort Worth 1950, no writ), the court held that a tax levy and assessment by the city council was binding although the proceedings did not strictly adhere to the letter of the law. The court determined:

> Viewing this record as a whole, we have concluded that the levy. . . shown to have been done and performed, although not strictly following the letter of the law, [was] not void,. . . but [was] well within the spirit of the law and constitute(s) substantial compliance with the law.

*Id.* at 607.

The substance of appellant's argument centers on the data used in calculating Item 11 (Eleven) of the Effective Tax Rate (ETR), labeled "Tax levy needed to satisfy debt service (I & S)." Appellants assert that the City deliberately overestimated and misrepresented the tax levy needed to satisfy the debt service.

The estimated figure for item 11 is $14,935,000.00. This figure, used to determine the I & S rate, creates an Effective I & S Rate of $0.24637 per $100 valuation.[2] The Effective I & S Rate ($0.24637) plus the Effective M & O Rate ($0.32428) creates an effective tax rate of 0.57065. The actual tax rate adopted by the City for 1984, is composed of: M & O (0.4056) + I & S (0.1594) = actual Tax Rate (0.5650), which is less than the overall effective tax rate of 0.57065. Appellants argue, however, that because the City used an actual I & S figure of 0.1594, creating a line 11 figure of $9,238,480.00, that the 1984 Effective Tax Rate should have been $0.48368 per $100 valuation [M & O (0.32428) + I & S (0.15940) = ETR (0.48368)]. This ETR would result in the adopted tax rate exceeding the correct ETR by more than the percentage allowed by the Tax Code, thus violating the law.

2. Effective I & S Tax Rate is determined as follows: 1984 I & S levy (item 11 figure) divided by the 1984 total taxable value ($14,935,000.00 ÷ $6,061,994.953) = Effective I & S rate for 1984 (0.24637/$100).

The Effective Tax Rate forms the groundwork for adoption of the City's actual tax rate. *See* Texas Property Tax Board. *Compliance Package/'84.* The total amount that is needed or could be used to satisfy debt service will not necessarily equal the amount upon which the actual tax rate is levied (i.e., the $14,935,000.00

figure versus the actual $9,238,480.00 figure). Likewise, the estimated tax rate will not necessarily equal the actual adopted tax rate. On the contrary, appellants' argument is based on hindsight; because the actual rate of taxation is based on the estimated effective tax amounts, it would be virtually impossible for the estimated effective tax rate to equal the actual rated. The Tax Code only requires that the actual rate does not exceed the effective rate by more than three percent. Appellants mix the rates, and add the actual I & S rate (0.15940) with the estimated effective M & O rate (0.48368); such method of calculation is not required by either the Tax Code, or the Tax Board Compliance Package for 1984, which provides the directions and forms used to calculate an effective tax rate in accordance with the Tax Code and Texas Constitutional requirements. Moreover, the *actual* I & S and M & O figures are not known until the effective tax rate has been calculated. Only by hindsight is one able to rearrange the rates so as to come up with such a lower ETR figure.

Appellants overlook the fact that the Property Tax Code assesses the total ETR figure, and not the individual I & S and M & O rates which make up the total rate. The City may not "adopt a [total] tax rate that exceeds the tax rate calculated as provided by Section 26.04 of this code by more than three percent." TEX. TAX CODE ANN. § 26.05(c). The summary judgment evidence indicates that five other cities in Texas (Austin, Abilene, Fort Worth, Lubbock, San Antonio) calculate the ETR and pass their tax levy ordinances in the same manner as Corpus Christi. In addition, we find nothing in the record which adequately refutes the presumption of the validity of the City's 1984 tax levy. On the contrary, each of the taxing authority representatives deposed stated that, according to the figures given, the City would not be required to publish a notice and hold a hearing regarding the 1984 adopted tax rate. Finally, appellants offered no controverting proof at the summary judgment hearing to show that the debt figures presented by appellee do not accurately represent the actual bonded indebtedness. We find that the City has complied with the Tax Code provisions in calculating the effective and adopted tax rates. Appellants' first point of error is overruled.

By their second, third, and fourth points of error, appellants claim that the summary judgment was rendered erroneously because it left unresolved issues regarding the validity, legality and constitutionality of City Ordinance 18449,[3] and additional issues left unresolved by the trial court's judgment.

3. City Ordinance No. 18449 implemented the City's adopted tax levy for 1984.

We note, that insofar as appellants attack the constitutionality of the City Ordinance and § 26.04 of the Tax Code, appellants did not make any response to appellee's motion for summary judgment, but rely solely on their bare and conclusory statements contained in their pleadings. The determination by this Court of appellants' first point of error disposes of the alleged invalidity of the City Ordinance. The constitutionality of a statute is a question of law. It is presumed that the legislature has not acted unreasonably or arbitrarily and the burden is on the one who challenges an act to establish its unconstitutionality. Spring Branch I.S.D. v. Stramos, 695 S.W.2d 556 (Tex. 1985); Helns v. Texas Alcoholic Beverage Commission, S.W.2d 607 (Tex. App.—Corpus Christi 1985, no writ). No argument or authority has been properly presented on appeal as to the purported illegality of the Tax Code. Appellants' constitutional issues, therefore, are not properly before this Court. Appellants' second, third and fourth points of error are overruled.

The judgment of the trial court is AFFIRMED.

FORTUNATO P. BENAVIDES
Justice

Opinion ordered published. TEX. R. CIV. P. 452.
Opinion delivered and filed this the 29th day of August, 1986.

**SUPREME COURT OF TEXAS**
**P. O. Box 12248**
**Supreme Court Building**
**Austin, Texas 78711**
**Mary M. Wakefield, Clerk**

December 17, 1986

Mr. Herbert L. Hawkins, Jr.
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RE: Case No. C-5917

STYLE:
CORPUS CHRISTI TAXPAYERS'S ASSOCIATION ET AL.
v.
THE CITY OF CORPUS CHIRSTI

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,
Mary M. Wakefield, Clerk
By _____
Deputy

## AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

**Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**§ 21. Increase in total property taxes; notice and hearing; calculation**

Sec. 21 (a) Subject to any exceptions prescribed by general law, the total amount of property taxes imposed by a political subdivision in any year may not exceed the total amount of property taxes imposed by that subdivision in the preceding year unless the governing body of the subdivision gives notice of its intent to consider an increase in taxes and holds a public hearing on the proposed increase before it increases those total taxes. The legislature shall prescribe by law the form, content, timing, and methods of giving the notice and the rules for the conduct of the hearing.

(b) In calculating the total amount of the taxes imposed in the current year for the purpose of Subsection (a) of this section, the taxes on property in territory added to the political subdivision since the preceding year and on new improvements that were not taxable in the preceding year are excluded. In calculating the total amount of taxes imposed in the preceding year for the purposes of Subsection (a) of this section, the taxes imposed on real property that is not taxable by the subdivision in the current year are excluded.

(c) The legislature by general law shall require that, subject to reasonable exceptions, a property owner be given notice of a revaluation of his property and a reasonable estimate of the amount of taxes that would be imposed on his property if the total amount of property taxes for the subdivision were not increased according to any law enacted pursuant to Subsection (a) of this section. The notice must be given before the procedures required in Subsection (a) are instituted.

Adopted Nov. 7, 1978, eff. Jan. 1, 1979. Amended Nov. 3, 1981.

**NO. 84-4323-E**

**IN THE DISTRICT COURT OF**
**NUECES COUNTY, TEXAS**
**148TH JUDISICAL COURT**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, ET AL.**
**VS.**
**CITY OF CORPUS CHRISTI**

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Corpus Christi Taxpayer's Association, et al., plaintiffs in this cause file this Memorandum in support of their Motion for Summary Judgment. Plaintiffs have brought a Declaratory Judgment action for a determination that Ordinance 18449 of the City of Corpus Christi and that the 1984 Notice of Calculation of Effective Tax Rate and Publication of Estimated Unencumbered Fund Balances are illegal and unlawful as violative of Article 8, Section 21 of the Texas Constitution and Chapter 26 of the Tax Code.

Plaintiff would show the court that the uncontradicted summary judgment evidence demonstrates that Defendant (1) increased property taxes from 1983 to 1984 by more than 3 % without following the notice, hearing and vote procedures required by Section 26.06, Tax Code, and (2) used an incorrect I & S tax rate in the Calculation of Effective Tax Rate which resulted in an improper calculation of the tax rate under Section 26.04, Tax Code.

**I. FACTS:**

On July 24, 1984, Plaintiffs filed their Original Petition asking the Court to enjoin Defendant from setting its actual tax rate for fical year 1984-85 until after publication of the Notice of Effective Tax Rate as set forth in Section 26.04, Tax Code.

The 1984 Notice of Calculation of Effective Tax Rate ("Notice" attached as Exhibit A) for the City of Corpus Christi signed by Mr. Charles Daly, Tax Assessor-Collector on July 30, 1984 set forth the following facts pertinent to this suit:

| | |
|---|---|
| M & O Effective Tax Rate | .32428/$100 |
| I & S Effective Tax Rate | .24637/$100 |
| 1984 Total Taxable Value | $6,061,994,953 |
| 1984 Adjusted Taxable Value for M & O | $5,660,151,788 |
| Adjusted 1983 Tax Levy | $ 18,354,947 |
| 1984 I & S Levy Needed to Satisfy Debt | $ 14,935,000 |

1984 Effective Tax Rate .57065/$100

On July 31, 1984, Defendant adopted a budget ("budget" a summary attached as Exhibit B) which contained the following facts:

Total Tax Rate .56500/$100
General Fund Tax Rate (M&O) .40560/$100
Debt Service Tax Rate (I&S) .15940/$100

These rates would generate and M & O levy of $24,388,728 and and I & S levy of $9,584,722.

On July 31, 1984, Defendant adopted Ordinance 18379 setting a tax rate for the 1984 tax year. The tax rates adopted were:

M & O Tax Rate .3785/$100
I & S Tax Rate .1895/$100

This was a total tax rate of .5680/$100.

Subsequently on September 4, 1984, Defendants adopted Ordinance 18449 ("Tax Ordinance" attached as Exhibit C) setting a tax rate for the 1984 tax year. The Tax Ordinance set the following tax rates:

M & O Tax Rate .4056/$100
I & S Tax Rate .1594/$100

This was a total tax rate of .5650/$100.

On November 30, 1984, Plaintiff filed an Amended Original Petition for Declaratory Judgment asking that the Tax Ordinance be declared illegal and unlawful as violative of Article 8, Section 21 of the Texas Constitution and Chapter 26 of the Tax Code in that the Defendant adopted a tax rate which in fact exceeded the effective tax rate by more than 3% without providing notice, holding a hearing and voting on a tax increase as required by law and the Defendant calculated an effective tax rate which used the incorrect I & S rate.

**II. ARGUMENT AND AUTHORITIES:**

Article 8, Section 21 of the Texas Constitution imposes a limitation on the ability of a taxing unit to raise taxes over the amount of taxes levied in the prior year as follows:

> (a) Subject to any exceptions prescribed by general law, the total amount of property taxes imposed by a political subdivision in any year may not exceed the total amount of property taxes imposed by that subdivision in the preceding year unless the governing body of the subdivision gives notice of its intent to consider an increase in taxes and holds a public hearing on the proposed increase before it increases those total taxes. The legislature shall prescribe by law the form, content, timing, and methods of giving the notice and the rules for the conduct of the hearing.

The legislative implementation of this constitutional mandate is found in Chapter 26 of the Tax Code. Section 26.04, Tax Code, creates a mechanism for comparison of the constitutional limitation of amount of taxes imposed in the prior year to the amount of taxes imposed in the current year. This mechanism is referred to as the effective tax rate. The effective tax rate is the tax rate that if applied to the current year taxable value will yield last years' tax levy. The formula for the effective tax rate is:

(1) 1983 Adjusted M&O Levy § 1984 M&O Effective Tax Rate
1984 Adjusted Taxable Value

(2) 1984 I&S Levy Needed to Satisfy Debt
1984 Total Taxable Value

= 1984 I&S Effective Tax Rate

(3) 1984 M&O Effective Rate PLUS
1984 I&S Effective Tax Rate EQUALS
1984 Effective Tax Rate

The Adjusted M & O Levy is determined according to a formula set forth in Section 26.04(c), Tax Code. The adjusted M & O Levy is the amount of taxes imposed in the prior year minus last year's debt levy and minus taxes imposed on property last year which is no longer taxable in the current year. The Adjusted Taxable Value is set forth in Section 26.04(d), Tax Code, as the total taxable value of property that was not taxed last year. The adjustments attempt to allow for a comparison of the same levy and same taxable property in the prior year as in the current year.

The formula for the M & O effective tax rate is set forth in Section 26.04(d), Tax Code, as:

> . . .the tax rate that if applied to the total taxable value submitted to the governing body less the taxable value of new property would impose the amount of property taxes determined as provided by Subsection (c) of this section.

The formula for the I & S effective tax rate is set forth in Section 26.04(d), Tax Code, as:

> . . .the amount that, if applied to the total taxable value submitted to the governing body, will impose the amount of taxes *needed* to pay the principal of and interest on debt of the unit. . .(emphasis added)

The sole measure of an "increase" in taxes from one year to another for purposes of Truth-in-Taxation and the constitutional mandate is the M & O effective tax rate component of the total effective tax rate. The I & S effective tax rate component never reflects and "increase" in taxes for purposes of Truth-in-Taxation.

The reason for this is that a taxing unit may levy whatever taxes are *needed* for debt service. Thus, no matter how much the debt service levy is increased from the prior year, it will not reflect a tax increase for the purpose of Truth-in-Taxation. Only an increase in M & O levy will reflect an increase in taxes for purposes of Truth-in-Taxation.

A proposed increase in taxes triggers certain procedures which must be followed prior to the adoption of an actual tax rate. Section 26.05(c), Tax Code, provides that:

> The governing body may not adopt a tax rate that exceeds the tax rate calculated as provided by Section 26.04 of this code by more than three percent until it has held a public hearing on the proposed increase and has otherwise complied with Section 26.06 of this code.

Section 26.06, Tax Code, sets forth the following procedures: (1) a meeting must be held wherein the governing body discusses the proposed tax increase and sets a date for a public hearing on the increase; (2) a quarter-page ad must be published at least seven days before the public hearing setting forth the vote of the governing body, the amount of the increase and informing of the public hearing; (3) the public hearing on the proposed tax rate must be held wherein the opportunity to present views is given and a date is set for the actual adoption of the tax rate and such must be held on a weekday, in a public building and is subject to the Open Meetings Act; (4) a second quarter-page ad must be published; and (5) the governing body adopts the tax rate at a meeting held three to fourteen days after the public hearing.

The 1983 adjusted M & O levy for the City of Corpus Christi was $18,354,947. The 1984 adjusted taxable value was $5,660,151,788. This generated an M & O effective tax rate of .32428/$100. This is reflected as follows:

$$\frac{\$18,354,945}{\$5,660,151,788} = .32428/\$100$$

The City of Corpus Christi actually adopted an M & O tax rate of .4056/$100. If this tax rate is applied to the 1984 adjusted taxable value the formula and result would be as follows:

$$.004056 \times \$5,660,151,788 = \$22,957,575$$

Thus, if the M & O tax rate adopted by the City of Corpus Christi is applied to the same properties taxed in 1983 (1984 adjusted taxable value) a total levy of $22,957,575 would be generated. This amount of $22,957,575 should be compared for

purposes of the truth-in-taxation mandate to the 1983 adjusted tax levy of $18,354,945.

The City of Corpus Christi increased the M & O tax levy (the sole measure of a truth-in-taxation tax increase) by $4,702,630 or 25.6%. It is clear that the City of Corpus Christi increased taxes from 1983 to 1984 for purposes of Truth-in-Taxation. Despite this tax increase, the City of Corpus Christi has not followed the procedures set forth in Section 26.06, Tax Code.

On July 30, 1984, the City of Corpus Christi Notice stated that the City "needed" $14,935,000 for 1984 I & S levy. Yet the very next day, the City adopted a budget which indicated that the city "needed" an I & S levy of $9,239,580. On July 31, the City also adopted an actual I & S tax rate of .1895/$100 (which would generate a levy $11,487,480) and on September 4 reduced this rate by adopting an actual I & S tax rate of .1594/$100. A tax rate of .1594/$100 would generate a 1984 I & S levy of $9,662,819.

At the time of the calculation of the effective tax rate, the city knew or should have known that the figure of $14,935,000 used for the I & S levy was excessive. The City should have used either the budget figure of $9,239,580 or the actual I & S tax rate figures of $11,487,480 or $9,662,819 in the calculation. The use of the incorrect needed I & S levy substantially impaired the validity of the calculation of effective tax rate.

The City calculated a 1984 effective tax rate of .57065/$100. The sum of the M & O rate and I & S rate adopted by the city is .565/$100. Defendant argues compliance with truth-in-taxation based upon the adoption of an actual tax rate which is less than the effective tax rate. This may arguably be compliance on its face but it is clearly not compliance in fact.

The City should have used in the effective tax rate calculation the I & S rate of .1594/$100 that it adopted only *five days* after the calculation instead of using the clearly erroneous I & S rate of .24637/$100. In the alternative, the City should have recalculated the effective tax rate using the correct I & S rate.

The following comparison indicated the impact of the incorrect use of the I & S rate.

| **NOTICED OF EFFECTIVE TAX - July 30** | |
|---|---|
| M & O Rate | .32428/$100 |
| I & S Rate | .24637/$100 |
| Total Effective Rate | .57065/$100 |

| ACTUAL ADOPTED TAX RATE - Sept. 4 | |
|---|---|
| M & O Rate | .4056/$100 |
| I & S Rate | .1594/$100 |
| | .56500/$100 |

If the City had used the I & S rate that it adopted only five days after the Notice of Effective Tax Rate, the result would be as follows:

| CORRECT EFFECTIVE TAX RATE | |
|---|---|
| M & O Rate | .32428/$100 |
| Correct I & S Rate | .1594/$100 |
| Correct Effective Tax Rate | .48368/$100 |

Based on the actions of the City, a tax rate of .48368 correctly reflects the proper 1984 effective tax rate. The correct effective tax rate should then be compared to the actual adopted total tax rate of .5650. The actual adopted tax rate exceeds the correct effective tax rate by 16.8%. Thus, if the City of Corpus Christi had correctly calculated the effective tax rate they would have been required to follow the procedures in Section 26.06, Tax Code.

**III. SUMMARY:**

The M & O effective tax rate is the only component of the total effective tax rate which compares last year's tax levy to this year's tax levy for determination of a tax increase for purposes of truth-in-taxation. The City increased its M & O levy by $4,702,630 or 25.6%.

Further, the City incorrectly calculated the I & S effective tax rate component which resulted in a defective effective tax rate. The City stated in its Notice that it "needed" an I & S levy of .24637/$100, yet one day after the Notice it stated in its budget that it needed an I & S levy of *.1594/$100* and *five days* later actually adopted an I & S levy of .1594/$100. The use of .24637/$100 instead of .1594/$100 improperly distorted the effective tax rate. The correct effective tax rate should have been .48368/$100. The actual adopted tax rate exceeds the correct effective tax rate by 16.8%.

The City has not provided notice, held a hearing and voted on a tax increase as required by Section 26.06 for tax increases of 3% or more despite adopting a tax increase of 16.8%.

Plaintiff urges this Court to declare the Notice of Calculation of Effective Tax Rate and Tax Rate Ordinance 18449 invalid and illegal as contrary to Chapter 26, Tax Code.

Respectfully submitted,

LAW OFFICES OF HERBERT HAWKINS, JR.
921 Ayers
Corpus Christi, TX 78704
(512) 883-5900
State Bar No. 01247500

Counsel for Plaintiffs

PP.CR-001.A2

**NO. 84-4323-E**
**IN THE DISTRICT COURT**
**148TH JUDICIAL DISTRICT**
**NUECES COUNTY, TEXAS**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, TOM HUNT AND JOE O'BRIEN**

**PLAINTIFFS**

**VS.**

**CITY OF CORPUS CHRISTI**

**DEFENDANTS**

**RESPONSE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, City of Corpus Christi, Defendant in the above styled and numbered cause and files this its Response to Plaintiffs' Motion for Summary Judgment and in support thereof would show this Honorable Court the following:

I.

Plaintiffs are not entitled to a Summary Judgment for the reason that none of the Plaintiffs have standing to bring this cause of action in accordance with the Plea to the Jurisdiction filed herein and the attached affidavit of Juan Garza, Director of Finance. Therefore, this Court cannot grant Plaintiffs a Summary Judgment.

II.

Plaintiffs are further not entitled to a Summary Judgment for the reason that this Court does not have jurisdiction of this cause for the further reason that Plaintiffs have failed to plead and in fact the amount in controversy in this cause does not exceed $500.00. Therefore, this Court cannot grant Plaintiffs a Summary Judgment.

III.

Plaintiffs allege in Paragraph II, Motion for Summary Judgment, that they have attached to the Motion "The City of Corpus Christi Tax Rate ('Tax Ordinance') Tax Ordinance" and the "Notice

of Calculation of Effective Tax Rate" ('Notice'). Plaintiffs have failed to furnish any document attached to their Motion of Summary Judgment in accordance with said Paragraph II and the attached Certificate of service except an unsigned affidavit of Joe O'Brien and a Memorandum in support of Plaintiffs' Motion for Summary Judgment. Defendant does not know which of its ordinances or other notices used on a day to day basis Plaintiffs intend to reply upon in their Motion for Summary Judgment, both because of the vagueness of the allegation and the failure to attach any such "ordinance" or "notice." Therefore, there is not sufficient Summary Judgment proof before this Court for Plaintiffs' Summary Judgment to be granted and such Motion must be denied.

IV.

The attached affidavit of Joe O'Brien, even if properly signed, and as pointed out above the attachment forwarded to Defendant was not signed, is not sufficient to support a Summary Judgment as a matter of law. A statement that the affidavit is made based on personal knowledge and that the affiant is fully competent to make such affidavit is self serving and not in compliance with the requirements of the Rules of Civil Procedure. Mere conclusions of law, which such affidavit contains in Paragraphs 5, 6, and 7 are not competent evidence upon which to base a Summary Judgment. Further, that affidavit does not allege facts which show the amount in controversy is over $500.00 and the granting of a Summary Judgment on the basis of that affidavit is fundamental error and reversible error if this Court should render Judgment granting Defendants' Motion for Summary Judgment. Further, that affidavit does not show the affiant is competent to testify to the matters stated therein and the affidavit is controverted by the affidavit of Juan Garza, attached, hereto. Therefore, this Court cannot grant Summary Judgment for Plaintiffs.

V.

Plaintiffs are not entitled to a Summary Judgment in ths cause because this Court is without jurisdiction to hear their cause for each of the allegations in Defendants' Plea to the Jurisdiction on file in this cause which plea is incorporated herein the same as if written herein.

VI.

Plaintiffs are not entitled to a Summary Judgment for the reason that their First Amended Original Petition is defective and will not form the basis of any judgment whatsoever, for the reasons set forth in Defendants' special Exceptions, on file herein

which such exceptions are incorporated herein by this reference the same as if written herein.

VII.

Plaintiffs are further not entitled to a Summary Judgment for the reason that a genuine issue exists as to material facts necessary to establish Plaintiffs' cause of action. Plaintiffs have alleged conclusions of law in their Motion for Summary Judgment but such conclusions are not supported by the facts presently before this Court. In addition, the affidavit of Juan Garza, attached hereto, shows the existence of a genuine issue as to material facts necessary to establish Plaintiffs' cause of action. Therefore, this Court must deny Plaintiffs' Motion for Summary Judgment.

VIII.

Plaintiffs are further not entitled to a Summary Judgment for the reason that discovery in this matter is not complete and Defendants are proceeding with the timely setting of depositions of competent material expert witnesses in accordance with the attached affidavit of Juan Garza.

IX.

Defendant will further show that it did not violate any provisions of the Texas Constitution or the Property Tax Code as shown in the attached affidavit of Juan Garza and Plaintiffs are not entitled to a Summary Judgment.

X.

Defendants specifically deny that the allegations in Paragraph II, Motion for Summary Judgment constitute competent Summary Judgment proof but rather are mere conclusions of the pleader, therefore, Plaintiffs are not entitled to a Summary Judgment.

XI.

Defendants specifically deny that the allegations in Paragraph III, Motion for Summary Judgment constitute competent Summary Judgment proof but rather are mere conclusions of the pleader; therefore, Plaintiffs are not entitled to a Summary Judgment.

XII.

Defendants specifically deny that the allegations in Paragraph IV, Motion for Summary Judgment constitute competent Summary Judgment proof but rather are mere conclusions of the pleader; therefore, Plaintiffs are not entitled to a Summary Judgment.

WHEREFORE, PREMISES CONSIDERED, Defendant moves this Honorable Court deny Plaintiffs' Motion for Summary

Judgment; moves this Court to dismiss Plaintiffs' cause on the pleadings on file herein, which show this Court lacks jurisdiction to entertain Plaintiffs' cause of action; and for such other and further relief, both at law and equity to which Defendant may be entitled.

Respectfully submitted,

J. Bruce Aycock

City Attorney

By. _____
Hal George,
Senior Assistant City Attorney
(512) 880-3132
P. O. Box 9296
Corpus Christi, Texas 78469
TX. BAR #17809000

STATE OF TEXAS

COUNTY OF NUECES

This instrument was subscribed and sworn to before me on the *1st* day of April, 1985, by Hal George, Assistant City Attorney of the City of Corpus Christi.

_____
Notary Public in and for
The State of Texas

NORI LEWIS
My Commission Expires: *4-6-85* Notary Public, State of Texas

**CERTIFICATE OF SERVICE**

I, Hal George, do hereby certify that a true and correct copy of the above and foregoing was mailed, certified mail, return

receipt requested to Mr. Herbert L. Hawkins, Jr., 921 Ayers, Corpus Christi, Texas 78404, attorney for Plaintiffs, on this the *3rd* day of April, 1985.

Hal George

**NO. 84-4323-E**
**IN THE DISTRICT COURT**
**148TH JUDICIAL DISTRICT**
**NUECES COUNTY, TEXAS**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, TOM HUNT AND JOE O'BRIEN**

**PLAINTIFFS**

**VS.**

**CITY OF CORPUS CHRISTI**

**DEFENDANTS**

**AFFIDAVIT OF JUAN GARZA**

**STATE OF TEXAS**

**COUNTY OF NUECES**

BEFORE ME, the undersigned authority personally appeared Juan Garza, and after being duly sworn by me, stated the following upon his oath:

"My name is Juan Garza. I am above the age of twenty-one and have never been convicted of a felony or a crime involving moral turpitude.

I am employed by the City of Corpus Christi as Director of Finance. I have and exercised those duties set forth in Corpus Christi City Charter Article IV, §6, 7, 8, 9, and 10. In that regard, I serve as Tax Assessor-Collector of the City of Corpus Christi. I am the officer or employee of the City of Corpus Christi designated by the governing body, the City Council of the City of Corpus Christi, to carry out the provisions of §26.04, et seq., Property Tax Code. Those functions are carried out by me and by employees under my supervision and direction. I have care and custody of the tax records of the City of Corpus Christi and have personal knowledge of those records.

Based on the aforesaid duties, and by virtue of my carrying out those duties, I have personal knowledge of the calculation of the Effective Tax Rate, Publication of requisite notices, and the adoption of Ordinances by the City Council of the City of Corpus Christi with regard to levying and collecting taxes, adoption of tax rates, and all related matters. I have care and custody of the records of the City of Corpus Christi with regard to ad valorem tax matters and am competent to testify to the matters stated herein.

The records of the Tax Office of the City of Corpus Christi do not reflect that the Corpus Christi Taxpayers Association owns any taxable property and that organization has not been assessed any taxes for the previous five (5) years. The records of the City Tax Office further reflect that Tom Hunt, Sr., has paid the 1984 taxes assessed against property owned by him, or such taxes have been paid on his behalf. The records of the City Tax Office further reflect that J. E. O'Brien has paid the 1984 taxes assessed against property owned by him, or such has been paid on his behalf. Both such tax payments were made voluntarily, without duress, and without protest. A voluntary payment of taxes not under duress will not support a refund of even an illegal tax.

Further, if the City of Corpus Christi tax rate for 1984 had been set at $0.4836 per $100 of value rather than the duly adopted rate of $0.5605 per $100 of value Tom Hunt, Sr. would have paid $351.26 and J. E. O'Brien would have paid $319.18. They actually paid $398.08 and $361.71 respectively. The difference being a total of $89.35, or less than $500.00.

For the tax year 1984, the City of Corpus Christi calculated and published an effective tax rate of $0.57065 per $100.00 of valuation. For the tax year 1984, the City of Corpus Christi actually adopted a tax rate of $0.5605 per $100.00 of valuation. The tax rate as adopted by the City of Corpus Christi did not exceed the effective tax rate and, in fact, the adopted tax rate was lower than the calculated Effective Tax Rate. Therefore, for the tax year 1984, the City of Corpus Christi did not violate either the spirit or the letter of "Truth In Taxation" as that term is used in the property Tax Code.

I have read the compliance package of the State Property Tax Board, all the relevant issues of their monthly newsletter "State-

ment" and attended seminars and meetings where the calculation of the Effective Tax Rate, required Notices, and Adoption of Tax Rates and levies were discussed. I further discussed this matter with Mrs. Debbie Wheeler, Associate Director for Education and Training of the State Property Tax Board and have read her deposition.

Based upon the above and foregoing and my personal knowledge of the calculation of the Effective Tax Rate, and the adoption of the Tax Rate by the City of Corpus Christi, I can state that the tax rate adopted by the City of Corpus Christi for the tax year 1985 did not exceed the Calculated Effective Tax Rate by more than three percent. I can state that such adopted tax rate did not exceed the Calculated Effective Tax Rate by more than eight percent and I can categorically state that the adopted tax rate did not exceed the Calculated Effective Tax Rate by twenty-five percent.

Contrary to the allegation in Paragraph 6 of the unsigned affidavit furnished to Defendant, the Maintenance and Operation Effective Tax Rate is not the sole component of the total Effective Tax Rate which reflects a property tax increase for purposes of "Truth in Taxation." In fact, Plaintiffs allege just the opposite in Paragraph IV, Plaintiffs' First Amended Original Petition for Declaratory and Injunctive Relief at paragraph (b) where Plaintiffs allege: "The addition of the M&O effective rate to the I&S rate creates the Effective Tax Rate for the taxing unit." For the purposes of Truth in Taxation, the Effective Tax Rate is the rate that cannot be exceeded by more than three percent without the notice of hearing provisions. The Effective Tax Rate indicated in Plaintiffs' First Amended Petition, supra, is the total of the Maintenance and Operation Rate and the Interest and Sinking Fund Rate. That is the important rate for taxpayers since that rate forms the basis of which their bill is calculated.

Contrary to the allegations in Paragraph 7 of the unsigned affidavit of Joe O'Brien, the City of Corpus Christi held all required public hearings, gave all notice, and held the required vote in adopting the tax rate and tax levy ordinances for the tax year 1985. A survey of Texas Cities shows that the following cities calculate the Effective Tax Rate and pass their tax levy ordinance in the same manner as the City of Corpus Christi: Fort Worth, Austin, Lubbock, San Antonio, and Abilene. Copies of their calculations are attached hereto and made a part hereof.

The City of Corpus Christi is at this time in contact with Tax Assessor-Collectors and Directors of Finance of these various Texas Cities and arranging for their depositions to be taken in this cause so that the Court will have before it evidence of the proper method of calculating the Effective Tax Rate and setting the tax rate from acknowledged tax professionals who are engaged in complying with the Property Tax Code as part of their assigned job responsibilities.

I have read Defendant's Plea to the Jurisdiction, Special Exceptions, and second Amended Original Answer on file in this cause. I have personal knowledge of facts and allegations based on my aforesaid employment with the City of Corpus Christi. Those facts and allegations are true and correct upon my personal knowledge of said Plea to the Jurisdiction, Special Exceptions, and Second Amended Original Answer is attached hereto and incorporated herein by this reference the same as if written herein."

_____

Juan Garza

Subscribed and sworn to before me, the undersigned authority, on this the *3rd* day of April, 1985, by Juan Garza, Director of Finance of the City of Corpus Christi, a municipal Corporation, home rule City and body politic duly organized under the laws of the State of Texas.

_____

Notary Public in and for the
State of Texas

NORI LEWIS
Notary Public, State of Texas

My Commission Expires: *4-6-85*

**EXHIBIT "A"**

**NO. 84-4323-E**
**IN THE DISTRICT COURT**
**148TH JUDICIAL DISTRICT**
**NUECES COUNTY, TEXAS**

**CORPUS CHRISTI TAXPAYER'S ASSOCIATION, TOM HUNT AND JOE O'BRIEN**

**PLAINTIFFS**

**VS.**

**CITY OF CORPUS CHRISTI**

**DEFENDANTS**

**PLAINTIFF'S THIRD AMENDED ORIGINAL PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

The CORPUS CHRISTI TAXPAYER'S ASSOCIATION, INC., TOM HUNT, SR., and JOE O'BRIEN, Plaintiffs in the above-entitled and numbered cause file this THIRD AMENDED PETITION FOR DECLARATORY JUDGMENT, pursuant to the provisions of Article 2524-1, Revised Civil Statutes of Texas, for adeclaration that ORDINANCE of the CITY OF CORPUS CHRISTI (hereinafter referred to as "ORDINANCE") "( )" describing the taxes to be levied, assessed and collected by the CITY OF CORPUS CHRISTI, TEXAS, for the year 1985 and ordained and such other years as the same be applicable; providing a savings clause; and declaring an emergency" and NOTICE OF CALCULATION OF EFFECTIVE TAX RATE and PUBLICATION OF ESTIMATED UNENCUMBERED FUND BALANCES (hereinafter referred to as "NOTICE") are illegal and unlawful as violative of Article S, Section 21 of the Texas Constitution and Chapter 26 of the Tax Code. As amended June 14, 1985 and effective on said date.

I.

Plaintiff, CORPUS CHRISTI TAXPAYER'S, INC., is a non-profit Corporation duly organized under the laws of the association whose purpose and goal is to monitor, protect, defend, owners of property located in Nueces County, Texas. A copy of the By-Laws and Articles of Incorporation are filed herein and incorporated by reference in this Petition for all purposes.

Appendix Item

II.

Plaintiffs, TOM HUNT, SR. and JOE O'BRIEN, are residents and qualified registered voters of the CITY OF CORPUS CHRISTI and own taxable property located within the CITY OF CORPUS CHRISTI, NUECES COUNTY, TEXAS.

The Defendant, CITY OF CORPUS CHRISTI, is a Municipal corporation duly organized under the laws of the State of Texas, upon whom service of citation may be had serving its Mayor, LUTHER JONES, its City Manager, or other authorized representative at 302 S. Shoreline, Corpus Christi, Nueces County, Texas.

III.

Article 8, Section 21(a) of the Texas Constitution which is applicable to Defendant requires Defendant to provide notice and hold a public hearing if the total amount of property taxes imposed by Defendant in any year exceeds the total amount of property taxes imposed in the preceding year.

The total amount of property taxes imposed by Defendant in the current tax year exceeded the total amount of taxes imposed in the prior tax year by more than 8 percent, however, Defendant failed to adequately provide the required notice and failed to provide a public hearing as required by law. The failure to provide notice and hearing is illegal and unlawful.

IV.

Chapter 26 of the Property Tax Code which is applicable to Defendant sets forth the procedures ("TRUTH-IN-TAXATION" procedures) which govern the adoption of a tax rate. These procedures are as follows: (a) an officer or employee designated by the governing body of a taxing unit shall calculate a tax rate (hereinafter referred to as "M & O effective tax rate") that after deducting taxes imposed for debt in the prior year will when applied to the total taxable value for the current tax year impose the same amount of taxes as imposed in the prior year, (b) to the M & O effective tax rate the officer or employee shall add another

rate (hereafter referred to as the "I & S rate") that if applied to the total taxable value for the current year would impose the amount of taxes needed for payment of debt in the current year. The addition of the M & O effective rate to the I & S rate creates the "effective tax rate" for the taxing unit; (c) a governing body must publish in a paper of general circulation the effective tax rate, the calculations used to derive the effective tax rate and the unencumbered balances in its M & O funds and I & S funds. (the "NOTICE"); (d) a governing body may not adopt an actual tax rate that exceeds the effective tax rate by more than 3 percent until it has followed certain prescribed procedures including publicizing the proposed increase and holding a public hearing on the proposed increase as follows: (1) a meeting must be held wherein the governing body discusses the proposed tax rate, decides by record vote the proposed amount of tax increase and sets a date for a public hearing on the increase; (2) a quarter-page ad must be published at least seven days before the public hearing setting forth the vote of the governing body, the amount of the increase and informing of the public hearing; (3) the public hearing on the proposed tax rate must be held wherein the opportunity to present views is given and a date is set for the actual adoption of the tax rate and such must be held on a weekday, in a public building and is subject to the Open Meetings Act; (4) a second quarter-page ad must be published; (5) the governing body adopts the tax rate at a meeting held three to fourteen days after the public hearing; and (6) the governing body may not adopt a tax rate that exceeds the effective rate by more than three percent unless it first complies with these procedures. (e) The governing body shall reduce a tax rate to the effective tax rate and may not adopt a higher tax rate unless it complies with these procedures. (f) If the governing body of a taxing unit adopts a tax rate that exceeds the effective tax rate by more than eight percent, the qualified voters of the taxing unit by petition may require that an election be held to determine whether or not to reduce the adopted tax rate to a rate that exceeds the effective tax rate by only eight percent.

Chapter 26 of the property tax defines debt as follows:

"(g) In Subsection (c) and (d) of this section, 'debt' means *a bond, warrant, certificate of obligation, or other lawfully authorized evidence of indebtedness issued or assumed by the taxing unit that is:*

*"(1)* (an-obligation) secured by *a pledge of the unit* property taxes;

*"(2) (of-the—unit—and) not payable from revenue-budgeted for current maintenance and operating expenses;*

"(3) Payable in installments over a period longer than one year; and

"(4) Payable solely from property tax revenue —and includes-bonds—warrants—certificates—of—indebtedness.

V.

Ordinance 18379 adopted by Defendants on July 31, 1984 set a M & O tax rate of $0.3785/$100 and an I & S tax rate of $0.1895/$100. This M & O tax rate will generate a 1984 tax levy of $22,944,650. This I & S tax rate will generate a 1984 tax levy of $11,487,480.

VI.

Subsequently, Defendants adopted on September 4, 1984 Ordinance 18449 which set a new M & O tax rate of $0.4056/$100 and a new I & S tax rate of $0.1594/$100. This M & O tax rate will generate a tax levy of $24,587,451. This I & S tax rate will generate a 1984 tax levy of $9,662,819.

VII.

The 1984-1985 Budget for the City of Corpus Christi approved by Defendants on July 31, 1984 sets forth a total tax levy of $33,974,000. This is generated as set forth in the Budget by a M & O rate of $0.4056/$100 and an I & S rate of $0.1594/$100.

VIII.

Defendant approved and adopted an I & S tax rate of $0.1594/$100. This rate is significantly lower than the I & S rate used to calculate the effective tax rate. The use of an I & S rate of $0.25637/$100 instead of the actual I & S rate of $0.1594/$100 in the effective tax rate calculation resulted in an illegally and unlawfully calculated effective tax rate. The use of $0.1594/$100 would have resulted in a correct and proper effective rate of $0.4836/$100.

IX.

Defendant published in the NOTICE an M & O effective tax rate of $0.3242/$100. Defendant adopted an actual M & O tax rate of $0.4056/$100.

Defendant increased M & O levy from $19,045,049 in 1983 to $24,587,451 in 1984.

XI.

The tax rate adopted by Defendant of $0.5650/$100 exceeds the legal and correct effective tax rate of notice of this increase and failed to hold a public hearing on this increase. This tax rate increase without notice and public hearing is illegal and unlawful.

XII.

The "Ordinance" and "Notice" in question and their application to Plaintiffs interfere with and impair the legal rights and privileges of the Plaintiff in that: (a) they were denied a notice of an increase in taxes; (b) they were denied the opportunity to participate in a public hearing on the proposed increase in taxes; (c) they were denied the right to petition for an election to repeal the tax increase, and (d) will have imposed upon their property an amount of taxes that exceeds the lawful amount, the existence and attachment upon the property of Plaintiffs' of tax liens to secure payment of the unlawful amount of taxes, which liens relate back to January 1 of the tax year and cause the District's appraisal roll and the taxing units' tax roll to be in error; thus directly resulting in injury to Plaintiff.

XIII.

Plaintiffs contend that the "NOTICE" is invalid and unconstitutional in that an incorrect I & S rate was utilized thereby resulting in a larger effective tax rate than authorized by law.

XIV.

Plaintiffs contend that the "ORDINANCE" is invalid and unconstitutional in that it sets a tax rate that exceeds the correct and proper effective tax rate by more than 3 percent without following the requirements of "TRUTH-IN-TAXATION".

Plaintiffs' contend that the Defendant used the M & O, and I & S rates adopted in 1984 in its formula for calculation of the tax rate in 1985. The use of the 1984 and 1985 tax rates in the 1985 calculation of the effective tax rate resulted in a illegal and unlawful effective tax rate which exceeds the previous years tax rate by more than 16 percent.

The 1985 M & O and I & S tax rate adopted by the City is illegal and unconstitutional for the reason that the said 1984 M & O figures used in the calculation are composed of items legally defined as "debt" which should have been included in the I & S tax rate. This results in a total tax rate which exceeds the prior year's tax rate by 16.8 percent in violation of Chapter 26 and Article 8, Section 21 of the Texas Constitution.

Plaintiffs' requests that this Court find and declare that the 1985 "NOTICE" and "ORDINANCE" in question are invalid and further request that this Court order Defendants to recalculate the effective tax rate and otherwise comply with the provisions TRUTH-IN-TAXATION or in the alternative to reduce the tax rate set by Defendants to the proper and correct effective tax rate of $0.4836/$100.

XV.

Plaintiffs' further alleges that the actions of Defendants and its employees were not in good faith for the reason that Defendants had notice and knowledge of said defects but failed to correct them. The designated officers or employees of the Defendants have intentionally and willfully failed to comply with said Statute.

XVI.

The total tax rate for 1985 submitted by the CITY OF CORPUS CHRISTI and the published calculations resulted in an unlawful tax increase in violation of the Constitution of Texas, Article VIII, Section 21 and Chapter 26.01 through 26.15 of the Property Tax Code and other applicable statutes which require equality and uniformity of taxation and has effected unjust and unlawful discrimination against Plaintiffs and the parties represented by Plaintiffs. An unlawful and unjust tax burden has been created, if permitted to stand, will deprive Plaintiffs' members and Plaintiffs, individually, of their property without due process of law.

XVII.

The above acts by the Defendant will continue unless restrained by this Court.

Plaintiffs have no adequate remedy at law and having diligently pursued their rights and made every effort to secure equal and uniform taxation and through protest of incorrect and unfair tax rate calculated without the benefit of public hearing regarding said calculations for verification, are without redress, their only remedy being to obtain injunctive relief as hereinafter set forth.

XVIII.

Defendant should be enjoined from setting any future tax rate and collecting any further property taxes until after public hearing on any tax increase above the legal rate.

XIX.

The 1984 and 1985 "ORDINANCE" and "NOTICE" in question and their application to Plaintiffs interfere with and impair the legal rights and privileges of the Plaintiffs in that: (a) they were denied a notice of an increase in taxes; (b) they were denied the opportunity to participate in a public hearing on the proposed increase in taxes; (c) they were denied the right to petition for an election to repeal the tax increase, and (d) will have imposed upon their property an amount of taxes that exceeds the unlawful amount.

XX.

COUNT THREE

Plaintiffs', TOM HUNT and JOE O'BRIEN have been deprived of "property" and "liberty" without due cause of law in violation of Article I, Section 19, Constitution of the State of Texas and the Fourteenth Amendment to the United States Constitution.

The City has used the acts and methods described in Paragraph III through XXX of this Petition, which are incorporated by reference herein, to so deprive Plaintiffs.

As a further direct and proximate result of the acts of Defendant, CITY OF CORPUS CHRISTI, as described above, Plaintiffs, TOM HUNT and JOE O'BRIEN, have been damaged in the amount of at least TWO HUNDRED AND FIFTY DOLLARS ($250.00) each due to overpayment of property taxes in 1983. In addition, Plaintiffs will be damaged in the amount of TWO HUNDRED AND FIFTY DOLLARS ($250.00) for each year in their lifetime. Plaintiffs each have a life expectancy of at least twenty (20) YEARS and will be damaged in the amount of at least TWO HUNDRED AND FIFTY DOLLARS ($250.00) for each of the next TWENTY YEARS (20) because all future tax rates will be based upon this improper tax calculation if it is not changed to Plaintiffs' additional damage in the amount of at least FIVE THOUSAND DOLLARS ($5,000.00).

XXI.

COUNT FOUR

IN THE ALTERNATIVE, PLAINTIFFS ALLEGES THAT

On or about September 1, 1983, the Texas Legislature enacted a statute known as the PROPERTY TAX CODE, and the legal citation of which is Subsection (c) and (d), Section 26.04, Tax Code, as amended by Section 1, Chapter 400, Acts of the 68th Legislature, Regular Session, 1983, by Section 3, Chapter 987, Acts of the 68th Acts of the 68th Legislature, Regular Session, 1983, and by Section 1, Chapter 1001, Acts of the 68th Legislature.

Said Statute is unconstitutional and void in that it deprives Plaintiff, the CORPUS CHRISTI TAXPAYERS ASSOCIATION'S members and Plaintiffs, TOM HUNT and JOE O'BRIEN of their rights to liberty or property other than due process of law, contrary to Article I, Section 19, of the Constitution of the State of Texas and the Fifth and Fourteenth Amendment to the United States Constitution. The Statute is so vague as to be unenforceable. The Statute fails to so specify the method of calculation to be used by a taxing entity, thus allows taxing units such as the Defendant, CITY OF CORPUS CHRISTI to deprive Plaintiffs'

members and Plaintiffs of their property through taxation without due course of law.

Plaintiffs have denied due course of law as heretofore described in Paragraph I through XIX which are incorporated by reference herein for all purposes.

As a result of Defendant's illegal 1984 and 1985 "NOTICE" and "ORDINANCE", Plaintiffs were compelled to retain the services of the undersigned attorney at law who is licensed to practice in Texas. Plaintiff therefore demands from the Defendants reasonable attorney's fees as authorized in Section 10 of Article 2524-1, Revised Civil Statutes of Texas and Chapter 26 of the Property Tax code as amended.

WHEREFORE, Plaintiffs request that Defendants be cited to appear and answer herein, and that Plaintiff have judgment as follows:

(a) A declaration that on final hearing hereof, NOTICE OF CALCULATION OF EFFECTIVE TAX AND PUBLICATION OF ESTIMATED UNENCUMBERED FUND BALANCES prepared by Defendant in 1984 and 1985 are illegal and invalid;

(b) A declaration that on final hearing hereof, ORDINANCE 18449 dated September 4, 1984, and ORDINANCE adopted in 1985 by Defendant, are invalid;

(c) A declaration that the tax rate adopted by the 1984 and 1985 ORDINANCES exceeds the proper and legal effective tax rate by more than 3 percent.

(d) A declaration that the proper and legal effective tax rate is $0.4836/$100 for 1984.

(e) Costs of Court in this cause expended or incurred;

(f) That a final hearing on the merits be held to determine the true effective tax rate of the CITY OF CORPUS CHRISTI as required by law.

(h) A declaration that the ORDINANCE 18379 adopted by Defendant on July 31, 1984 and 18449 adopted on September 4, 1984 are unconstitutional and void and that the 1985 Tax ORDINANCES are unconstitutional.

(i) A declaration that the tax rate adopted by the 1984 is illegal and void and that the property effective tax rate be $0.4836/$100 and that the 1985 tax rate is illegal and void.

(j) In the alternative, that Subsection (c) and (d), Section 26.04, Tax Code, as amended by Section 1, Chapter 400, Acts of the 68th Legislature, Regular Session, 1983, and by Section 1, Chapter 1001, Acts of the 68th Legislature, Regular Session 1983, be declared unconstitutional and void.

(k) That a mandatory injunction then issue commanding the City through the proper official to set the correct tax rate;

(l) Recover from Defendants, and each of them, reasonable attorney's fees; and

(m) Such other and further relief, at law or in equity, as to which by this pleading or proper amendment thereto, they may show themselves justly entitled to receive.

Respectfully submitted,

LAW OFFICES OF
HERBERT L. HAWKINS, JR., P.C.
921 Ayers
Corpus Christi, Texas 78404
(512) 883-5900

_____

HERBERT L. HAWKINS, JR.
ATTORNEY FOR PLAINTIFF

STATE BAR NO.: 09247500

Supreme Court, U.S.
FILED
APR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1478

In The

# Supreme Court of the United States

October Term, 1988

CORPUS CHRISTI TAXPAYERS' ASSOCIATION, TOM HUNT, and JOE O'BRIEN,

*Petitioners,*

v.

CITY OF CORPUS CHRISTI, and STATE OF TEXAS,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT CITY OF CORPUS CHRISTI'S BRIEF IN OPPOSITION TO CERTIORARI

Carol Estes Bray
Senior Assistant City Attorney
Counsel of Record

Felix Hallum George, Jr.
City Attorney

City of Corpus Christi
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*Attorney for Respondent City of Corpus Christi*

April, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

33 pp

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1) Whether the United States District Court lacks jurisdiction or is barred by res judicata, where Petitioners Complaint alleged they were denied due process by the Courts of the State of Texas in previous litigation, and that they were denied due process by the City of Corpus Christi as to the 1984 tax levy, the subject matter of the previous litigation.

2) Whether the Court of Appeals for the Fifth Circuit correctly imposed sanctions under 28 U.S.C. 1927, FED. R. CIV. P. 11, and FED. R. APP. P. 38.

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| The United States Supreme Court should refuse the application for Writ of Certiorari to the Court of Appeals: The United States District Court does not have jurisdiction over Petitioners' alleged cause of action, since the action was an attack or appeal of a state court judgment; alternatively, the Petitioners' claims would be barred under the doctrine of Res Judicata. | |
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28 U.S.C. 1927 ..... i, 15

42 U.S.C. 1983 ..... 3, 7, 8, 12

FED. R. CIV. P. 11 ..... i

FED. R. APP. P. 38 ..... i, 15

SUP. CT. R. 17 ..... 2, 6

SUP. CT. R. 49.2 ..... 15, 16

No. 88-1478

In The

# Supreme Court of the United States

October Term, 1988

CORPUS CHRISTI TAXPAYERS' ASSOCIATION, TOM HUNT, and JOE O'BRIEN,

*Petitioners,*

v.

CITY OF CORPUS CHRISTI, and STATE OF TEXAS,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT CITY OF CORPUS CHRISTI'S BRIEF IN OPPOSITION TO CERTIORARI

The City of Corpus Christi respectfully prays that the petition for certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit be denied.

## OPINIONS BELOW

The opinion of United States Court of Appeals affirming the District Court's opinion is included in Petitioners' Appendix, page 1. The United States District Court Opinion dismissing the case of Petitioners for lack of jurisdiction and res judicata, is included in Petitioners' Appendix, page 11. The opinion of the District Court upon remand is included in Respondents' Appendix B. None of these were reported.

The three decisions rendered in the Court system of the State of Texas are included in Petitioners' Appendix, pages 16-24. The Opinion of the District Court of the State of Texas was unreported. (Petitioners' Appendix, p. 16). The Opinion of the Court of Appeals, affirming that decision, was reported at 716 S.W.2d 579. (Petitioners' Appendix, p. 17). The denial of the application for writ of error by the Texas Supreme Court was unreported. (Petitioners' Appendix, p. 24).

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## JURISDICTIONAL GROUNDS OVER SUBJECT MATTER

This Court has jurisdiction to review by writ of certiorari the decision of the United States Court of Appeals for the Fifth Circuit by virtue of 28 U.S.C. 1254(1). However, the Court should deny the writ, since no grounds for reversing same have been presented which would fall within the scope of SUP. CT. R. 17: The legal question as to whether a District Court had jurisdiction under these facts has already been decided by this Honorable Court. The

decision of the Court of Appeals is not in conflict with this Court or any Federal Appeals Courts, or State Courts. Further, the opinion of the Court, being soundly based on prior decisions of this Court is correct: A United States District Court had no authorization to review a decision of a State Court, even under the guise of a 1983 claim, such power of review being limited to the United States Supreme Court. The decision of the Court of Appeals awarding sanctions is not in conflict with any decisions of this Court, Federal Courts of Appeals or State Courts, nor is the award an important question of federal law.

The issue as to constitutional right to a hearing is not before this Court; the issue was not decided by the Appellate Court, the case having been summarily dismissed for lack of subject matter jurisdiction. Any issue as to "nullity" of State Court judgments "denying due process" is misplaced. This Honorable Court does not have jurisdiction to review the State Court decision, which was rendered in December of 1986. The Plaintiff has not and cannot ask herein for review of that decision. Only if the State Court decision had been directly appealed, could the Supreme Court address the due process claim, as was done in *Perlata v. Heights Medical Center, Inc.*, 495 U.S. —, 108 S.Ct. 896 (1988).

The Petitioners are here seeking review of the decision of the Court of Appeals for the Fifth Circuit in upholding the District Court's dismissal and awarding sanctions. Review is therefore limited to the issues of jurisdiction, res judicata, and sanctions. Stated another way: can the Petitioners seek in a United States District Court

review of the State Court decision as to an alleged violation of due process which might "nullify" the decision; and is such a suit frivolous?

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## COUNTERSTATEMENT OF THE CASE

The City of Corpus Christi denies and refutes Petitioners' Statement of the Case.

The case is accurately explained by the Opinions of the District Court (Petitioners' Appendix, p. 11) and the United States Court of Appeals for the Fifth Circuit. (Petitioners' Appendix, p. 1).

The City specifically denies that Petitioners were denied a hearing by the Corpus Christi City Council. All actions of the City Council were taken at open public meetings of the City Council, Petitioner Joe O'Brien addressed the Council and at a later meeting a representative of the Taxpayers Association addressed the Council on this same matter.

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## FEDERAL COURT JURISDICTION

The United States District Court did not have subject matter jurisdiction of the case. (See Argument). The District Court has the jurisdiction necessary in order to determine its own jurisdiction. *Familia de Boom v. Arosa Mercantil, S. A.*, 629 F. 2d 1134 (5th Cir. 1980), rehearing en banc, 634 F. 2d 1355, *cert. denied*, 451 U.S.

1008 (1980). The United States Court of Appeals had jurisdiction of the Appeal pursuant to 28 U.S.C. 1291 (Supp. 1986).

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## REASONS FOR DENYING THE PETITION

### A. Introduction

This case involves only one major issue: Can the Petitioners relitigate in Federal District Court a cause of action litigated in State Court? The Court of Appeals correctly said no and, in a strongly worded opinion, correctly ordered sanctions to be awarded the Respondents herein, who are once again forced to defend an action without merit. Petitioners did not seek appeal or review of the State Court ruling to the United States Supreme Court but filed a separate suit in the Federal District Courts, through which they now seek relief in the Supreme Court from the State Court ruling. This Court should deny the petition for a writ of certiorari and put an end to this litigation.

The decision of the United States Court of Appeals addressed two issues: 1) That Petitioners' case in the United States District Court was correctly dismissed due to the prior litigation in State Court, and 2) That sanctions should be imposed.

This Court has jurisdiction to review by writ of certiorari the decision of the United States Court of Appeals for the Fifth Circuit by virtue of 28 U.S.C. 1254(1). However, the Court should deny the writ, since no grounds for reversing same have been presented which would fall

within the scope of SUP. CT. R. 17: The question of law at issue has already been settled by this Court. The decision of the Court of Appeals is not in conflict with this Court or any Federal Appeals Courts, or State Courts. Further, the opinion of the Court, being soundly based on prior decisions of this Court, is correct.

The issue decided by the Court of Appeals for the Fifth Circuit has already been decided by this Court: This Court has held that a United States District Court does not have subject matter jurisdiction to review State Court judgments even where Constitutional violations are claimed; such powers of review being limited to the United States Supreme Court; alternatively, the doctrine of res judicata prohibits trial of these issues.

The Petitioners' complaint in Federal Court (Appendix A), that the City of Corpus Christi denied them a public hearing as to the 1984 tax levy and that they were denied due process by the State of Texas Courts, was the subject of an identical suit by the same parties in the Texas State Court. The public hearing issue was the crux of the prior lawsuit. Complaints of an improper summary judgment were raised on appeal and determined by the State Court of Appeals.

Complaints of constitutionality were pled in the petition and ruled on by the trial Court in its decision that the plaintiffs were not entitled to recovery. The issue was waived on appeal, by plaintiff's failure to raise same.

Petitioners claim that the constitutional issues were not addressed by the State Court. However, these issues

were specifically pled and addressed by the Court. This Court has already ruled that a Federal Court cannot review a State Court judgment or review issues addressed or inextricably intertwined in the State Court proceeding. These issues were more than simply intertwined, they were the identical issues before the State Court. The doctrine of res judicata prohibits trial in the Federal Court of the constitutional issues: they were specifically pled in the State Court and were tried or could have been tried with the use of due diligence. The filing of the lawsuit is patently frivolous.

**B. Subject Matter Jurisdiction**

The United States District Court did not have jurisdiction over Petitioners' alleged cause of action, since the action was an appeal or attack of a State Court judgment.

The United States District Court has no power to review a State Court judgment, even where Plaintiff claims a deprivation under 42 U.S.C. 1983, constitutional grounds, or that such judgment was erroneous.

1) The United States District Court has no authority to review judgments of State Courts. *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415, 416 (1923).

2) Review is not available even under the guise of a violation of 42 U.S.C. 1983. Petitioners argue that the action they pursue in the United States Ditsrict Court is not an appeal of a previous State Court decision, but a separate 42 U.S.C. 1983 cause of action arising out of the

denial of due process as a result of the state judicial proceedings. Even where Petitioner alleges deprivation of property without due process by a decision of a State Court, a Federal District Court has no jurisdiction. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman and Hickey*, 460 U.S. 462 (1983), (referred to hereinafter as *Feldman*).

The Supreme Court has consistently denied a petition to review the numerous cases of the United States Court of Appeals for the Fifth Circuit which hold "that Federal District Courts do not have jurisdiction under 42 U.S.C. 1983 or any other theory to reverse or modify the judgments of State Courts." *Lampkin-Assam v. Supreme Court of Florida*, 601 F.2d 760 (5th Cir. 1979), citing *Cheramie v. Tucker*, 493 F.2d 586, 589 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974); *Hanna v. Home Insurance Co.*, 281 F.2d 298, 303 (5th Cir. 1960), *cert. denied*, 365 U.S. 838 (1961); *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir), *cert. denied*, 311 U.S. 655 (1940); *Warriner v. Fink*, 307 F.2d 933 (5th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); *Manufacturers Record Publishing Co. v. Lauer*, 268 F.2d 187 (5th Cir.), *cert. denied*, 361 U.S. 913 (1959).

3) This lack of jurisdiction is not changed by the form of relief sought. Petitioners claim the District Court suit is not an appeal but a new cause of action. This rule that the District Court cannot review State Court judgments applies even though the relief sought is not in the form of an appeal. In *Feldman, supra* at 468, where the Plaintiffs sought declaratory and injunctive relief, the Court found lack of jurisdiction.

Regardless of how the Petitioners wish to label their cause, the result is the same—Petitioners sought review by

the United States District Court of judicial proceedings already completed by the Courts of the State of Texas.

4) Any issue pled or intertwined with the State Court proceeding is not reviewable by the United States District Court. Petitioners claim that the State Court failed to rule on the Constitutional issues.

a) The Constitutional issues were ruled on by the Court, by its statement denying any form of relief to the plaintiffs. The Constitutional issues were pled: (Petitioners' Appendix, pp. 43, 49). Petitioners stated that they had been deprived of property and liberty without due "cause" of law in violation of Art. 1, Sec. 19, Constitution of the State of Texas and the 14th Amendment to the Constitution. The Court of Appeals noted that since Petitioners had failed to present any argument or authority as to the illegality of the Tax Code, the constitutional issues were not before the Court (Petitioners' Appendix, p. 23). They were therefore ruled on by the Court's decision in favor of the City of Corpus Christi. Any constitutional issue was not addressed by the Texas Court of Appeals *specifically* because the appellants (Petitioners) failed to bring the issue forward (Petitioners' Appendix, page 23). The issue as to whether the Trial Court wrongly ruled in granting the Summary Judgment was specifically addressed by the State Court of Appeals in a lengthy and detailed opinion (Petitioners' Appendix, pp. 17-23) and cannot be relitigated in the United States District Court.

b) Even a challenge to the tax levy or the State Court proceedings on Constitutional grounds not brought to the State Court is not reviewable. This Court has stated that ". . . if the Constitutional claims are inextricably

intertwined in the State Court's denial in a judicial proceeding . . . then the District Court is essentially called upon to review the State Court decision." *Feldman* at 482. "Where determination of . . . [a] claim necessarily involved some review of the merits or its State Appeal, the Constitutional claims are inextricably intertwined." *Pennzoil Co. v. Texaco,* 481 U.S. —, 107 S. Ct. 1519 (1987). In this particular case, Petitioners' claims are not simply "intertwined", but are on their face a *direct challenge* to the prior State Court judgment. The United States District Court may only review challenges to State proceedings "which do not require review of a State Court judgment in a particular case." *Id.*

"Where federal relief can only be predicted upon a conviction that the State Court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the State Court judgment." *Id.*

5) Petitioners' arguments regarding alleged error and lack of due process by the State Courts are only responded to briefly. These issues of error and due process are not before this Honorable Court as they were not decided by the United States District Court nor the Court of Appeals. The Court examined the pleadings and decisions of the State Court, not to determine their validity, but to determine whether the State Court judgment was on the merits and whether it involved identical parties, issues, and claims, to the extent such facts were not revealed by Petitioners' pleadings.

The Complaint on its face showed that Petitioners were afforded due process. Prior rulings of this Court

do not support a due process violation in this instance. Unlike *Peralta, supra,* where the defendant lacked notice and any opportunity to defend, the Petitioners instigated the State action. Petitioners' only claim of failure of due process is that a motion for summary judgment was granted, allegedly in error. Petitioners were granted due process by the Courts; they fully utilized the Court system; they had the opportunity and did appeal. Error in rendition of a judgment does not constitute a violation of due process. The fact that a party loses his fight does not indicate that he was denied a fair fight. Petitioners' bold statement that the State Court judgment is a nullity is false. Their entire cause of action in the Federal Court is a collateral attack seeking to void the judgment. Any alleged error in granting the summary judgment does not nullify the judgment.

6) The multiple cases cited by Petitioners for the proposition that Federal Courts may review State Court decisions only stand for the well settled principle that the United States Supreme Court may review decisions of a State Court for violations of due process. None of the cases cited allows the United States District Court jurisdiction to review State Court decisions. Indeed, this Court has held that Federal appellate review of judgments rendered by State Courts can only occur in this Court. *Pennzoil Co. v. Texaco, Inc., supra.* (Marshall concurring). (Such jurisdiction is only invoked, however, where the appeal or review is direct, unlike this case.) The District Court had no authority to review the prior State Court decisions.

No conflict exists with *Peralta v. Heights Medical Center, Inc.*, 495 U.S. —, 108 S.Ct. 896 (1988), in which

an appeal was taken directly to the Supreme Court, no question of the District Court jurisdiction was addressed by the Supreme Court.

Petitioners cite *Pennzoil Co. v. Texaco, Inc., Id.,* and *Railroad Commissioners of Texas v. Pullman,* 312 U.S. 496 (1941) for the proposition that District Courts have jurisdiction of causes of action under 42 U.S.C. 1983. This is a true statement which is not inconsistent with the opinion of the Court of Appeals that the District Court lacks subject matter jurisdiction of a claim under 42 U.S.C. 1983 where, as in this instance, such claim is simply a hidden review, appeal, or attack of a State Court decision.

The Court of Appeals agreed that Petitioners' remedy should have been to the United States Supreme Court. (Petitioners' Appendix p. 6.). This statement is in agreement with and not in conflict with any cases cited by the Petitioners as to the jurisdiction and authority of the Supreme Court.

The Supreme Court would have been the appropriate forum for a review of the State Court judgment, however, such review was not timely requested.

Petitioner does not contest that the State Court case involved the exact same issues, but instead challenges the State Court ruling on Constitutional and due process grounds. Such attacks on the validity of a State Court judgment are not within the jurisdiction of the Federal District Courts.

**C. Res Judicata**

Even if the District Court had subject matter jurisdiction in this cause, the principle that the Petitioners'

claims would nevertheless be barred under the doctrine of res judicata, is well established by this Court.

A judgment upon the merits in a suit in a State District Court is res judicata in a suit in the United States District Courts, where the courts have concurrent jurisdiction. *Grubb v. Public Utilities Commission of Ohio,* 281 U.S. 470 (1930). A Federal Court must give the judgments of State Courts the same full faith and credit they have by law or usage in the State Court. *Marrese v. American Academy of Correspondence Surgeons,* 470 U.S. 373 (1985). A State judgment must be given the same res judicata effect in Federal Court that it would be given in the Court of the rendering State. *Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984). Res judicata applies with full force to civil rights actions. *Id.* at 82; *Blynthe v. Hinckley,* 180 U.S. 333 (1902); *Allen v. McCurry,* 449 U.S. 90, 105 (1980).

Petitioners allege that the State Court did not rule or refused to rule on the Constitutional claim and the Summary Judgment did not include same.

Res judicata applies not only to issues which are litigated but which could have been litigated.

A final judgment is res judicata not only as to matters actually presented to sustain or defeat the right asserted, but also in respect to any other matter which might have been presented, or which could have been raised. *Grubb v. Public Utilities Commission of Ohio,* supra; *Allen v. McCurry,* supra. Any issue not litigated could have been litigated in the State Court litigation, as State Courts

have concurrent jurisdiction with the United States District Courts to determine Constitutional claims. *Blynthe v. Hinkley*, supra; *Allen v. McCurry*, supra at 105. Indeed, Petitioners' lawsuit to void the State Court judgment in order to enforce its rights is an admission that the State Court judgment included an adjudication of those rights.

**D. Sanctions**

The decision of the Court of Appeals in awarding damages to the City of Corpus Christi is not in conflict with decisions of this Court, the Courts of Appeals, or State Courts. The only case cited as conflicting with the instant case is that of *Pennzoil v. Texaco*, 784 F.2d 1183 (2d cir.), *rev'd*, 107 S.Ct. 1519 (1987). In that case neither the Supreme Court nor the Second Circuit addressed or mentioned imposition of sanctions. No conflict exists. Even prior to the current rules specifying imposition of attorneys fees as sanctions, this Court has recognized the ability of the courts to award expenses, including attorneys fees, to a litigant whose opponent acts in bad faith, or willfully abuses the judicial process. *Roadway Express v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Sanctions are especially appropriate and necessary where the law is clear and the defending party has been put to undue expense of multiple litigation.

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## CONCLUSION

No valid reason for granting the Writ has been proffered. No decisions of the Court of Appeals or State Courts have been cited by Petitioner as being in conflict with the decision herein. Indeed, the decision of the Court of Appeals is fully supported by decisions of this Honorable Court.

The City of Corpus Christi has already been forced to defend itself in the State District Court, State Court of Appeals, Texas Supreme Court, Federal District Court and United States Courts of Appeals. The position taken by Petitioners is not supported by law. Indeed, the Court of Appeals for the Fifth Circuit found that the "appeal involved legal points not arguable on their merits" and imposed damages against the Petitioners under 28 U.S.C. 1927 and FED. R. APP. P. 38 (Petitioners' Appendix P. 8). The City of Corpus Christi should not be forced to defend itself further.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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## RULE 49.2 MOTION FOR INTEREST AND DAMAGES

Respondent, City of Corpus Christi, has shown that the Petition for writ of certiorari is frivolous. The initial filing of this lawsuit and its appeal have already been determined to be frivolous, yet Petitioners persist in pursuing this litigation. The question of jurisdiction has already been determined by this Court and is well settled. Petitioners' claims: that they may file first in State Court

and then in Federal Court, that a summary judgment rendered is a denial of due process, are the result of flawed logic and distortions of the principles cited.

The City of Corpus Christi has been damaged by the filing in this Court as follows:

1) It has been forced to devote additional attorney hours in preparation of this response. Attorney hours are valued at $100.00 per hour according to the District Court, (Respondent's Appendix B) and the City has or will spend 30 hours to the date of filing this response;

2) Costs of printing (Estimated to be $662.00);

3) Interest lost through postponement of the collection of the sanctions awarded here; plus

4) Expenses ofpostage, telecopy and long distance.

It is clear that pursuit of this case is a gross abuse of the judicial process, with demonstrable harm to the City of Corpus Christi. Although this case does not involve significant money damages, the continued litigation has forced the staff to devote significant time and resources to the defense of an important asset: its 1984 tax levy.

Wherefore, the Respondent moves the Court to deny the Petition for Writ of Certiorari or if granted, to affirm the decision of the Court of Appeals for the Fifth Circuit, and upon such denial or affirmance, to allow damages in accordance with Sup. Ct. R. 49.2.

Respectfully submitted,

CAROL ESTES BRAY
Senior Assistant City Attorney
Counsel of Record

FELIX HALLUM GEORGE, JR.
City Attorney
City of Corpus Christi
Legal Department
P. O. Box 9277
Corpus Christi, Texas 78469-9277
(512) 880-3360

*Attorney for Respondent*
*City of Corpus Christi*

## APPENDIX A -

Petitioners' First Amended Complaint
in the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

| | | |
|---|---|---|
| CORPUS CHRISTI TAX-PAYER'S ASSOCIATION, TOM HUNT and JOE O'BRIEN, | ) | |
| Plaintiffs | ) | |
| V. | ) | Civil No. C-87-6 |
| CITY OF THE CORPUS CHRISTI and STATE OF TEXAS, | ) | |
| Defendants | ) | |

FIRST AMENDED COMPLAINT

I—JURISDICTION

1. This is a civil action seeking declaratory and equitable relief to prevent the denial of due process to the Plaintiffs, and to other taxpayers residing in the City of Corpus Christi, Texas. Jurisdiction is invoked under the U.S. Constitution, Fourteenth Amendment, Section 1, and based on deprival of civil rights, 42 USC Sec.1983. There is jurisdiction in the Federal district court system under 28 U.S.C. Section 1331 or 1441. The proper venue for this action in this Court. 28 U.S.C. Sec. 1391(b).

II—PARTIES

2. The Plaintiff, *Corpus Christi Taxpayer's Association*, is a public interest organization formed by tax-

payers of Corpus Christi to represent the interests of its members and other taxpayers in Corpus Christi, Texas. The two individual Plaintiffs, *J. E. O'Brien* and *Tom Hunt*, are residents, homeowners and taxpayers in the City of Corpus Christi, Texas, and they are both members of the public interest organization.

3. The Defendant, *City of Corpus Christi, Texas,* is a city duly organized under the laws of the State of Texas. The second Defendant is the *State of Texas.*

4. Each Defendant is sued separately and in their official capacity as administrators and enforcers of the law. Relief is sought against each Defendant as well as any agents, employees, attorneys, managers and all other persons acting at their direction or under their authority or control.

5. Both Defendants operate necessarily under the laws of the Constitution of the United States [in particular Amendment XIV, Section 1], the Constitution of the State of Texas [in particular Article 8, Section 21], the Texas Property Tax Code [in particular Chapter 26] and certain ordinances of the City of Corpus Christi, Texas, adopted in connection with setting ad valorem tax rates for the year 1984.

## III—CLASS ACTION

6. This is a class action brought by the Plaintiffs in their own behalf and on behalf of others similarly situated pursuant to Rule 23 of Federal Rules of Civil Procedure. This class represented by Plaintiffs consists of

(1) all residents of the City of Corpus Christi, Texas who paid ad valorem taxes in the year 1984;

(2) all taxpayers of the State of Texas who have been deprived of a public hearing (as guaranteed by the Texas Constitution) by taxing unit action, such as that here adopted by city ordinance of the City of Corpus Christi, Texas.

The class is so numerous that joinder of all members is impracticable. The questions of law and fact here are common to the class. The defenses of the Defendants, who are representative parties, are typical of the claims or defenses of the class. The representative parties will fairly and adequately protect the interests of the class.

## IV—CAUSES OF ACTION

7. The Plaintiffs are given the right by under Article 8, Section 21(a) of the Texas Constitution, to "a public hearing" when as here a political subdivision [the City of Corpus Christi, Texas] increases the property tax rate over that prevailing in the preceding year. There was an increase in the tax rate imposed by the City of Corpus Christi, Texas in the year 1984, as opposed to the year 1983, based on "tax rates" as defined in the "Truth in Taxation" statutes of the state of Texas.

8. No "public hearing" was held by the City officials in connection with the 1984 tax rate increase, as required by the Texas Constitution and "Truth in Taxation" statutes, although Plaintiffs in an appearance before City Council demanded such right. By refusing to hold a hearing, The City deprived Plaintiffs of their civil rights in violation of 42 USC Sec. 1983. The City has consistently over the years followed a pattern of conduct abusive of taxpayers' rights. The City did comply with Plaintiffs'

demand for publication of the 1984 tax notice, but that notice contained false and incorrect data.

9. Upon being deprived of a public hearing, Plaintiffs filed suit against the City in a trial court of the State of Texas having jurisdiction, the 148th District Court of Nueces County, Texas. Both parties filed motions for summary judgment. The trial court granted the City's motion for summary judgment.

10. The trial court held no hearing and received no evidence, although an issue before the Court was the alleged false and incorrect "data" contained in the City's published notice. First, Plaintiffs were denied a hearing on this question of fact. Denial of a hearing by the trial court constituted denial of due process, as Plaintiffs were denied the opportunity to contest the validity of tax rate. Second, Plaintiff's right to present evidence was denied.

11. Further, the trial court failed to rule on issues raised by Plaintiffs' motion for summary judgment, thus denying Plaintiffs the opportunity for a hearing on their motion. Motions of Plaintiffs justified a judgment favorable to Plaintiffs.

12. Upon appeal by Plaintiff to the Thirteenth Supreme Judicial District of Texas all actions of the trial court (its rulings, ignoring of motions, denial of hearing and judgment) were sustained.

13. The Plaintiffs, by application for writ of error, then appealed to the Supreme Court of Texas. That case is identified as No. C-5917. The issues on appeal are fully explained in the two attachments to the Original Complaint, as follows: (1) marked as "Exhibit A of Com-

plaint'' entitled ''Petitioners' Application for Writ of Error'' by Herbert L. Hawkins, Jr. and (2) marked as ''Exhibit B of Complaint'' entitled ''Respondent's Brief in Response to Application for Writ of Error'' by Carol Estes Bray, Assistant City Attorney.

14. The Supreme Court on December 17, 1986 refused the application of Plaintiffs for a writ of error. See attachment marked ''Exhibit C of Complaint''. Such decision has become final.

15. The Texas courts, by denying Plaintiffs any hearing or any trial in their proceeding against the City to obtain a ''public hearing'', deprived Plaintiffs of their civil rights in violation of 42 USC Sec. 1983.

## V—PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant the following relief:

1. Certify this cause as a class action;

2. Issue an order declaring that the City tax proceedings and State of Texas proceedings here complained of are invalid and void, as being contrary to the U.S. Constitution, Article XIV and in violation of 42 USC Sec. 1983;

3. Issue an order directing the City to hold a ''public hearing'' as to its 1984 tax levy, and further comply with the ''Truth in Taxation'' Texas statutes, as adopted by the legislature and construed by the Texas State Property Tax Board;

4. Direct the Texas authorities to fix for the City for the year 1984 what is a valid tax rate (without any un-

authorized increase) pursuant to the "Truth in Taxation" statutes; which rate is to be used in subsequent years settings of tax rates; and make a refund of excess taxes collected by the City (amount of tax collected by the 1984 rate reduced by the illegal increase over a tax using the 1983 tax rate);

5. Grant such other relief as may be necessary to protect the right of Plaintiffs to a public hearing in the years 1984 and subsequent taxable years;

6. Issue orders to prohibit other taxpayers in the class from being deprived of their right to a "public hearing" in other similar cases involving ad valorem tax levies by other taxing units in Texas.

7. Award Plaintiffs their costs in connection with their efforts to obtain a public hearing, the cost of litigation in state and Federal courts, including costs incurred in litigating the year 1985, and including reasonable attorney's fees related to this proceeding, and such other relief as may appear to the court to be equitable and just.

/s/ GLYNN A. PUGH
GLYNN A. PUGH,
*Attorney for Plaintiffs*
P.O. Box 4932
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(512) 881-8483

## APPENDIX B

"Judgment" on remand

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

| | | |
|---|---|---|
| CORPUS CHRISTI TAXPAYERS ASSOCIATION, TOM HUNT, and JOE O'BRIEN | ) | |
| Plaintiffs | ) | |
| VS. | ) | CASE NO. C-87-6 |
| THE CITY OF CORPUS CHRISTI, AND THE STATE OF TEXAS | ) | |
| Defendants | ) | |

JUDGMENT

(Filed Nov. 17, 1988)

On November 10, 1988, came on before me the issues on remand herein and the Parties appeared with their attorneys of record;

Defendant, City of Corpus Christi has moved for sanctions against the Plaintiffs and their attorneys of record, pursuant to Rule 11, Federal Rules of Civil Procedure.

Additionally, on appeal the Defendant, City of Corpus Christi, moved for damages pursuant to Rules of Appellate Procedure 38. The United States Court of Appeals for the Fifth Circuit found that the Plaintiffs' appeal in-

volved legal points not arguable on their merits, and that the appeal was frivolous, and granted the Motion of the City for damages and remanded the case to this Court for determination of the reasonable attorneys' fees and expenses reasonably incurred by the City of Corpus Christi by virtue of the appeal. That Court also granted the City's motion to assess such costs against Plaintiffs' counsel personally, under 28 U.S.C. 1927 and remanded to this Court the decision as to apportionment of the award.

After hearing evidence and argument of counsel, the Court finds as follows:

I.

Both the attorneys hours testified to by the City of Corpus Christi and the hourly rate of $100 an hour are reasonable.

II.

The reasonable attorneys fees and other expenses reasonably incurred by the City of Corpus Christi by virtue of the appeal of the Plaintiff in this cause are as follows: Attorneys' fees in the amount of $2,600.00 plus costs in the amount of $96.00. These amounts are apportioned as follows: $2,446.00 to be paid jointly and severally by Plaintiffs, Corpus Christi Taxpayers Association, Tom Hunt, and Joe O'Brien and $250.00 to be paid by Plaintiff's Counsel, Glynn Pugh.

III.

The Court further finds that this suit is not warranted by existing law or any good faith argument for its extension, modification or reversal. Therefore, this Court finds

that a violation of Rule 11 exists. The Motion of the City of Corpus Christi for sanctions is hereby granted. In awarding this amount and making an allocation the Court has taken into consideration conflicting public policies. On the one hand Rule 11 requires as public policy the imposition of sanctions substantial in amount to discourage future violations of the Rule. On the other hand, counsel for the Taxpayers has served on a pro bono basis, and this litigation was based on an alleged denial of civil rights, both of which situations involve public policies encouraged by the Federal courts. The Court finds as follows:

Reasonable attorneys fees incurred by the City of Corpus Christi in this litigation prior to appeal are as follows: Attorneys fees in the amount of $2,700,00 which fees the Court finds are reasonable. The Court also finds that payment of such fees should be imposed as sanctions under Rule 11. These fees are apportioned as follows: $250.00 to be paid by Glenn Pugh, Plaintiff's Counsel, personally, and the balance of $2450.00 paid by the Corpus Christi Taxpayer's Association.

Reasonable attorneys fees incurred by the City of Corpus Christi in this litigation on remand are $600.00 to and through this proceeding, which fees the Court finds are reasonable. The Court also finds that such payment of these fees should be imposed as sanctions under Rule 11. These fees are apportioned as follows: $600.00 to be paid jointly and severally by the Corpus Christi Taxpayers Association, Tom Hunt, Joe O'Brien, and Glynn Pugh of which no more than $100.00 is to be collected from Glynn Pugh.

It is therefore ORDERED, ADJUDGED and DECREED that the Motion of City of Corpus Christi for Sanctions under Rule 11 be and is hereby granted, and

1) the Plaintiffs herein, Corpus Christi Taxpayers Association, Tom Hunt, and Joe O'Brien and counsel, Glenn Pugh, jointly and severally are hereby ORDERED to pay to the City of Corpus Christi the sum of $600.00, of which no more than $100.00 is to be paid by Glynn Pugh;

2) the Plaintiff Corpus Christi Taxpayers' Association is hereby ordered to pay additionally the sum of $2450.00 to the City of Corpus Christi; and

3) Glynn Pugh is ordered to pay the sum of $250.00 to the City of Corpus Christi.

Additionally, as damages under Rule 38 and 28 U.S.C. 1927:

4) Plaintiffs Corpus Christi Taxpayers Association, Tom Hunt, and Joe O'Brien are jointly and severally hereby ORDERED to pay the sum of $2,446.00 to the City of Corpus Christi and

5) Glynn Pugh is ordered to pay the sum of $250.00 to the City of Corpus Christi.

IT IS ORDERED that the amounts found and above determined are to be paid to the City of Corpus Christi on or before 90 days from the date of this hearing.

Signed this the 17 day of Nov., 1988.

/s/ H. W. Head, Jr.
Hayden W. Head, Jr.
United States District Judge

APPROVED AS TO FORM:

/s/ Glynn A. Pugh
Glynn Pugh,
Attorney for Plaintiff

/s/ Carol Estes Bray
Carol Estes Bray,
Attorney for Defendants

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1478

# In The Supreme Court of the United States October Term, 1988

**CORPUS CHRISTI TAXPAYERS ASSOCIATION, TOM HUNT, and JOE O'BRIEN,**
*Petitioners,*

v.

**CITY OF CORPUS CHRISTI, and STATE OF TEXAS,**
*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENT STATE OF TEXAS' BRIEF IN OPPOSITION TO CERTIORARI

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NO. 88-1478

**In The**
**Supreme Court of the United States**
**October Term, 1988**

---

**CORPUS CHRISTI TAXPAYERS ASSOCIATION, TOM HUNT, and JOE O'BRIEN,**
***Petitioners,***

**v.**

**CITY OF CORPUS CHRISTI, and STATE OF TEXAS,**
***Respondents.***

---

# ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# RESPONDENT STATE OF TEXAS' BRIEF IN OPPOSITION TO CERTIORARI

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## JURISDICTION

The court should not take jurisdiction because:

a. The decision of the Court of Appeals for the Fifth Circuit does not conflict with the decision of another federal court of appeals on the same matter, nor does the decision conflict with that of a state court of last resort. The decisions uniformly hold that a state cannot be sued in federal district court for alleged violations of 42 U.S.C. § 1983.

b. The question whether a state can be sued in federal court for an alleged violation of § 1983 is settled

by this Court, so answering this question is not a reason for granting review in this Court.

c. The federal court of appeals has decided the question whether a state can be sued in federal court for an alleged § 1983 violation in accordance with the decisions of this Court, so there is no reason to review this case because of a supposed conflict with a decision of this Court.

## STATEMENT OF THE CASE

Respondent disagrees with Petitioners' statement that it is undisputed that Petitioners were denied a hearing by the Corpus Christi City Council. The City of Corpus Christi offered evidence in state court that all required public hearings were held. (Petitioners' Appendix, Affidavit of Juan Garza, p. 41). Petitioners did not offer any controverting summary judgment proof. (Petitioners' Appendix, Texas Court of Appeals Opinion, p. 23). Therefore, Respondent submits that there is no support in the record for Petitioners' statement that Petitioners were denied a hearing by the Corpus Christi City Council.

Having failed to secure a favorable result in state court proceedings, Petitioners filed suit in federal district court seeking substantially the same relief as they sought in state court against the City of Corpus Christi, and in addition claiming that the State of Texas violated their civil rights in that the judges in the Texas court system made the wrong decisions.

The United States District Court dismissed the complaint; this was affirmed by the United States Court of Appeals in an unpublished opinion.

## QUESTION PRESENTED

Can a taxpayers association sue the State of Texas in federal district court for violation of 42 U.S.C. § 1983?

## REASONS FOR DENYING THE WRIT

**There is no conflict in the decisions.**

The Fifth Circuit Court of Appeals stated in its opinion below:

> However, the State is clearly immune from federal court suit under the Eleventh Amendment and is not a "person" for purposes of section 1983.

(Petitioners' Appendix, Court of Appeals Opinion, p. 7).

This holding presents no conflict with the decisions on the point. It is well settled that a state is immune from suit in federal district court unless it has given consent. *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973).

The State of Texas is not a person within the meaning of 42 U.S.C. § 1983; therefore it cannot be sued in federal district court for alleged violations under § 1983. *Vick v. Texas Employment Commission*; 514 F.2d 734 (5th Cir. 1975).

Even if the complaint could be amended to name the offending Texas jurists as parties defendant the district court would not have jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967); *Cheramie v. Tucker*, 493 F.2d 586, 589 (5th Cir.), *cert. denied* 95 S. Ct. 126 (1974). Finally, there seems to be no

authority, and Petitioners cite none, to support the proposition that, having lost their suit in state court against the City of Corpus Christi, the Petitioners can sue the State of Texas in federal district court under 42 U.S.C. § 1983 for making the wrong decisions.

**Petitioners cite no cases in conflict.**

The State of Texas offers the following discussion of cases cited by Petitioners to show that none of these cases has decided this question in a way that conflicts with any decision by this Court, by a federal court of appeals, or by a state court of last resort.

The jurisdiction of the United States Supreme Court in *Peralta v. Heights Medical Center*, 108 S. Ct. 896 (1988), a case cited by Petitioners, was invoked by direct appeal to the Supreme Court from the decisions of the Texas court, as allowed by 28 U.S.C. § 2101(c). The instant case is not at all like this, because here Petitioners initially filed suit in federal district court instead of petitioning the United States Supreme Court following a final decision in state court.

Petitioners cite five other cases that came directly to this Court either by appeal or by writ of certiorari from state court, so these cases are not authority that a § 1983 suit against the state can be initiated in federal district court. These cases are: *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct. 708, (1907); *Arkansas Writer's Project v. Ragland*, 107 S.Ct. 1722 (1986); *Davis v. Wechsler*, 263 U.S. 22, 44 S.Ct. 13 (1923); *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S.Ct. 556 (1932); and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961). None of these cases is in conflict with the decision of the Court of Appeals in this case; in fact, *Monroe v. Pape*, *supra*, tends to support it.

Three of the cases cited by Petitioners are *Pennzoil v. Texaco*, 107 S.Ct. 1519 (1987); *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643 (1941); and *District of Columbia Court of Appeals. v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303 (1983). None of these cases is authority for Petitioner's claim that the United States District Court has original jurisdiction of a § 1983 action against a state. In *Pullman, supra*, this court remanded the cause to the United States District Court to await the outcome of state court proceedings "to be brought with reasonable promptness." In *Pennzoil v. Texaco*, *supra* and *Feldman*, *supra*, this Court found that the federal district court had no jurisdiction over a judicial inquiry that originated in state court.

Finally, if these decisions impinge at all on the issues decided by the Court of Appeals, they only lend further support to the decision of the Court of Appeals; certainly, there is no conflict.

**Petitioners have not demonstrated that the question is important.**

The Court of Appeals determined that its opinion should not be published because of the local rule against "publishing opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law". Respondent submits that this is an accurate assessment of the importance of this case to the general public; therefore, this case presents no important question for review by this Court.

## CONCLUSION

For these reasons, and for the reasons stated in the opinions below, the application for writ of certiorari should be denied.

Respectfully submitted,

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April, 1989
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Supreme Court, U.S.
FILED
APR 25 1989
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CLERK

No. 88-1478

In The

# Supreme Court of the United States

October Term, 1988

CORPUS CHRISTI TAXPAYERS ASSOCIATION, TOM HUNT and JOE O'BRIEN,

*Petitioners,*

vs.

CITY OF CORPUS CHRISTI, TEXAS and STATE OF TEXAS,

*Respondents.*

**Petition for Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit**

## SUPPLEMENTAL BRIEF OF PETITIONERS IN REPLY to NEW MATTER (Rules 16 and 22)

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## COUNTERSTATEMENT OF ISSUES IN REPLY BRIEF

1- Are the Constitutional rights of Petitioners (Amendment XIV, due process; 42 USC Sec. 1983; 28 USC Sec. 1343) to prevail inviolate, or does the lower Federal court lack jurisdiction of the subject matter due to existence of a prior state judgment?

2- Does this petition raise only frivolous issues, in violation of Rule 49.2?

3- Are Petitioners entitled to relief as requested herein?

---

This reply brief of Petitioners presents new matter: recent litigation. Also, this reply brief responds to two new issues raised in the City's brief in opposition to certiorari.

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## 1-NEW MATTER: Other Litigation

The Petitioners (taxpayers of Corpus Christi complaining of a denial of due process by a state trial court which wrongfully dismissed their case) call to the attention of the Court three new matters not available at the time of their last filing with the Court.

First, a recent Texas Supreme Court decision reconfirms Texas law. The court wrote: A "summary judgment is proper only if the movant establishes that there are no genuine issues of fact and that he is entitled to judgment as a matter of law." *Rodriguez v. Naylor* (Tx.Suprm. Ct, 01/25/89) 763 SW2d 411, 412. Texas state court rulings in the instant case, dismissal with affirmance on appeal, are contrary to Texas law as set forth in *Rodriguez*, which cites and relies on other Texas court decisions rendered before the judgments in the instant case. By failing to apply the Texas law to Petitioners' appeal, the Texas supreme court denied Petitioners due process of law.

As stated in this Petition for Certiorari (p. 11) "a genuine issue as to a material fact" existed: Petitioners asserted a tax increase of 16.8% (App. p. 32) whereas the Respondent (City) denied that there was any increase in tax. The City admitted a genuine issue of fact existed. App. p. 36. A tax increase required that a public hearing be held, but no such hearing was held on the tax increase. In view of that controverted, material fact the trial court's granting of a summary judgment and dismissal, was error. That error, although properly asserted in the state appellate courts, was affirmed and Petitioners were denied due process of law.

A second material new matter is called to the attention of the Court: an appeal to the U.S. Supreme

Court, newly filed, which has not yet been docketed, *M&M Construction Co. v. Great American Insurance Co.* (received by the Clerk on February 21, 1989). This appeal presents another instance of the abusive practice of Texas trial court judges: the arbitrary granting of motions for summary judgments. The Petition describes this practice as common in Texas, Pages 16-17, as "patterns of abuse by state courts" and "In the Texas court system arbitrary procedures, such as arbitrary dismissals, are not an uncommon event." The *M&M* case presents one more abuse of discretion by a Texas trial court judge resulting in an arbitrary summary judgment, dismissal and denial of due process. In the *M&M* case dismissal was granted only by reason of the fact that pleadings filed in the case were simply ignored. See attached Exhibit A, which reproduces page 14 of *M&M* Statement of Jurisdiction. See also attached affidavit, Exhibit B.

Third, in *Browning-Ferris Industries, Inc. v. Kelco Disposal Inc.* (now pending before U.S. Supreme Court) involving the Constitutionality of an alleged "excessive fine" imposed by a state court system, the lower Federal courts had jurisdiction. During oral arguments Justice O'Connor referred to a "substantial expansion" of appeals in the Federal court system as well as the Supreme Court if it was held that the VIII Amendment applies to punitive awards by state courts. Incidentally, the scope of the XIVth Amendment is quite clear: its very purpose was to apply to the states to limit abuses of citizens by the states. Furthermore, it contains no wording to exclude state court judges. Wording of the civil rights statute, 42 USC Sec. 1983 is clear enough and broad enough, "Every person" with no wording to exclude state

court judges. The Federal district court has jurisdiction, 28 USC Sec. 1343. The wording of this statute has been ignored, but it should not be. Note it contains no wording to exclude state court adjudications. See *Rizzo v. Goode* (1976) 423 US 362. The essential issue here, the wrongful dismissal by the trial court, certainly was not ruled upon by the trial court, nor was it specifically ruled upon by appellate courts.

**2-New Factual Issue: Denial of Public Hearing**

The City in its Brief raises for the first time a new issue: it " . . . specifically denies that Petitioners were denied a hearing . . . ". City Briet, p. 4. The Texas Constitution, Article 8, Sec. 21, required that the City *"holds a public hearing on the proposed [tax] increase"*. The City's Brief attempts to deceive. As a matter of fact city council did actually hold a "meeting", to be distinguished from the prescribed "public hearing on the proposed increase". At the Corpus Christi city council "meeting" (the word used in City's brief) Petitioners' attorney appeared and made a twelve minute presentation (video-cassette available) discussing the City's irregular tax procedures which were in violation of Texas law. Petitioners contend the city officials did not hold the required "public hearing". As to a "public hearing on the proposed [tax] increase", none has ever been held by the City. To resolve this factual issue, this case should be remanded, and the dismissal set aside.

This paragraph is in error, and should not have been inserted in the City's Brief. The City's Brief contains

numerous other like errors, all of which are beyond the scope of this Brief of Petitioners.

### 3-Reply to City's Cross-Appeal Seeking Damages

The City asks for damages under Rule 49.2, based on an allegation of this petition being frivolous, stating that the question of jurisdiction "is well settled", and asserts "flawed logic and distortions of the principles cited". Petitioners remind the Court that the issue here involves a Constitutional right denied Petitioners by a state court in violation of the XIVth Amendment, which contains no words excluding state court systems from its scope. And the supporting jurisdictional statute, 28 USC Sec. 1343, giving Federal district courts jurisdiction over civil rights cases, contains no words excluding state court judges from its scope.

The flawed logic here is found in decisions of the lower Federal courts. Their decisions ignore 28 USC Sec. 1343 and use "subject matter jurisdiction" and "res judicata" to defeat the civil rights of petitioners. These Constitutional rights here, to have a public hearing and to due process of law, should prevail and these rights should remain inviolate.

### 4-Relief Requested by Petitioners

Petitioners ask the Court for the following relief: (1) an order directing the City to hold a public hearing on the 1984 tax increase or an order directing the trial court to proceed with the case; (2) order denying City's cross-appeal seeking damages under Rule 49.2; (3) an award to

Petitioners of court costs and damages under Rules 49.2 and 50 and (4) an award to be set by lower courts for sanctions, fees and costs based on Petitioners being the prevailing party and being victims of abuse due to denial of their civil rights.

Respectfully submitted,

GLYNN A. PUGH,
Counsel for Petitioners
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**Exhibit A**

* * *

recover from a surety a judgment against an insolvent principal.

Second, in the Texas court system there exists a pattern of granting summary judgments by trial judges in civil suits when dismissal is not justified. The instant case is not a solitary error. This arbitrary action of trial judges is common practice in the court system. Upon appeal the dismissals are usually affirmed. This arbitrary type of action by Texas courts tc clear up their dockets is common. This practice serves to deny litigants, both plaintiffs and defendants, access to courts. In turn numerous persons are thereby denied their rights under the Due Process Clause.

Third, a state appellate court has erred, rendering two judgments which are clearly inconsistent in result. As a result, sustaining the trial court's dismissal of this case resulted in denial of due process to Appellant. The inconsistent application of law here by the

* * *

**Exhibit B**

CORPUS CHRISTI TAXPAYERS ASS'N
v
CITY OF CORPUS CHRISTI

STATE OF TEXAS
COUNTY OF NEUCES

*AFFIDAVIT*
as to
*GRANTING OF SUMMARY JUDGMENTS*
*BY TEXAS TRIAL JUDGES*

Before me the undersigned authority on this day personally appeared, Glynn A. Pugh, to me well known, who, after being duly sworn, did depose and say as follows:

Counsel for Petitioners on April 10, 1989 interviewed a respected Nueces County trial judge with more than eight years of service regarding the practice of granting summary judgments by trial court judges. That judge made in substance the following statements:

1- Texas trial judges find themselves with many cases on their docket, and they seek to reduce their number.

2- It is common practice of Texas trial judges to purge long docket lists. A principal way of doing this is by the granting of summary judgments, which is done arbitrarily in the sole discretion of each judge.

3- It is common practice in Texas for a trial judge to dismiss any case which he personally dislikes, or has a particular aversion to in some way or other.

4- These dismissals by trial courts are done completely at the personal whim of each trial court judge.

5- A review of dismissals made by Texas trial courts should indicate the majority of them as being arbitrary, illogical and without regard to law. This practice, consisting of gross abuse of discretion, is unconscionable.

/s/ Glynn A. Pugh

SWORN TO and subscribed before me this 21st day of April, 1989.

/s/ Jan C. Titus
Notary Public, State of Texas

Printed name: Jan C. Titus
My commission expires: 3/31/90

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